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No. 74-1366

In the

Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT AND SANDRA SCHAEFER, et al.,
Petitioners,

vs.

FIRST NATIONAL BANK OF LINCOLNWOOD, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COURT

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Petitioners, Robert and Sandra Schaefer, et al., being plaintiffs, claimants and representatives of a class of all persons who purchased Hercules-Galion stock from July 1965 through August 1967, on behalf of themselves and all members of that class, pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case, (Court of Appeals No. 73-2128,) on January 30, 1975, but only that portion of such opinion affirming that portion of the final order of the United States District Court in the Northern District of Illinois which dismissed petitioners' Count II, an antitrust action.

OPINIONS BELOW

The original opinion of the District Court for the Northern District of Illinois is reported as follows: *Schaefer, et al* v. *First National Bank of Lincolnwood, et al,* 326 F. Supp. 1186. This dismissal appeared to be based soley on the grounds of incapatibility of an anti-trust claim with a Securities Act claim as opposed to any failure to allege a valid cause of action under the Sherman and Clayton Anti-trust Acts. At that time no effective order making the ruling final under Rule 54b was entered. A group of additional defendants was named and joined in the litigation in October, 1972. Judge McMillen in his June 25, 1973 order and opinion, not reported, then dismissed this anti-trust claim as to the October 1972 defendants (and respondents herein) based on Judge Decker's 1970 opinion. Judge McMillen's Rule 54(b) order of September 13, 1973 extends to the entire June 25, 1973 decision and Judge Decker's earlier decision. Thus the validity of plaintiffs' anti-trust claim is at issue with respect to all Appellees and respondents in this Petition for Certiorari. A copy of Judge McMillen's opinion is set forth in the Appendix to this Petition, infra.

This civil action originated from a criminal indictment charging an identical manipulation of the stock in question, which indictment was returned in the Southern District of New York on August 23, 1967, sub. nom *U.S.* v. *Projansky, et al,* 67 CR 729. A discussion of the criminal case and the underlying facts of this case is contained in the appeal therefrom, *U.S.* v. *Projansky, et al,* (Second Circuit, 1972) 465 F.2d 723, CD, 93 S.CT. 432 affirming all convictions.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered January 30, 1975 (See Appendix). A rehearing *en banc* was sought by one of the respondents herein, Rodman and Renshaw, on other issues not the subject of this Petition for Certiorari but which are expected to be the subject of a Petition for Certiorari to be separately filed solely on those issues by those respondents. That petition for *en banc* rehearing was denied. No rehearing or extension of time was either sought or granted with respect to the issue on which these petitioners request Certiorari. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

The sole question presented in this Petition for Certiorari is whether a classical manipulation of a stock from and to a certain price, which manipulation states a cause of action under Section 1 of the Sherman Act, is not maintainable solely because the same cause of action constitutes or is alleged as a cause of action under the Securities Acts. The complaint in this case is in three counts. It alleges a conspiracy to raise and maintain the trading price of Hercules-Galion stock on the American Stock Exchange as a direct violation of the Sherman Act ban on conspiracies and combinations to fix and maintain the prices of goods in interstate commerce. The complaint alleges in Count II a per se violation of that statute together with a private remedy in treble damages under Section 4 of the Clayton Anti-trust Act. Count II mirrors Count I which alleges the same set of facts as violations of the Securities Exchange Act.

One of the most important and timely issues of our time is presented here in the application of anti-trust remedies to classical market manipulations. The importance of anti-trust application and enforcement is one of the most important topics of our legal and economic climate today.

At issue are the lower Courts' interpretation of the interaction between the Securities Exchange Acts and the Anti-Trust Acts and their conflicts with and misinterpretation of U.S. Supreme Court and Circuit Court decisions in reaching the decision from which we seek relief.

APPLICABLE STATUTES

ANTI-TRUST LAWS

Sec. 1 Sherman Anti-Trust (15 USC 1)

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * * Every person who shall make any contract or engage in any combination or conspiracy hereby [55-1-7 of This Title] declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Clayton Anti-Trust Act (15 USC15)

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without

> respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee

SECURITIES LAWS

Sec. 28 Securities Exchange Act of 1934

> Section 28. (a) The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity, but no person permitted to maintain a suit for damages under the provisions of this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions), of any State over any security or any person insofar as it does not conflict with the provisions of this title or the rules and regulations thereunder.
>
> (b) Nothing in this title shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, or (3) with regard to the binding effect on any such member of any disciplinary action taken by the authorities of the exchange as a result of violation of any rule of the exchange, insofar as the action taken is not inconsistent with the provisions of this title or the rules and regulations thereunder.

STATEMENT OF THE CASE

This civil action alleges stock manipulation under the Securities Acts of 1933 and 1934 as Count I, the Sherman Act as Count II and common law fraud as Count III. The factual basis of each count is identical. Suit was filed in the U.S. District Court for the Northern District of Illinois on February 9, 1969. The New York criminal indictment was returned on August 23, 1967.

The original criminal indictment involved only individuals who were composed of three directors of the company manipulated, Hercules-Galion, several individual stockbrokers from New York and Chicago, and the President and Chairman of the Board of the First National Bank of Lincolnwood plus other private individuals. The allegations involved a conspiracy to manipulate and the manipulation of the stock of Hercules-Galion on the American Stock Exchange for the period of July, 1965 through August, 1967. The conspirators were charged with the conspiracy and manipulation of the stock upwards from a price of $6 to $12 per share and further attempt to manipulate it from $10 to $16 per share. The stock actually reached the first objective of $12 per share and later reached a price of $14 and a fraction but never reached the $16 per share figure. The conspiracy called for maintaining the price at or above $12 for a considerable period of time. The purpose of maintaining the inflated price was to permit the negotiation and consummation of a merger at the inflated price. The merger had been agreed upon but was never consummated due to a sharp rise in the market price of the other firm. The criminal indictment did not name any business defendants, but did name some unindicted co-conspirators who cooperated with the government. This civil complaint included the unindicted

co-conspirators, the defendants in the criminal case, the business defendants who were alleged to be controlling persons of the criminal defendants; the corporation itself, Hercules Galion, was named as a defendant in 1970 and two sets of various individual and business defendants were named as additional defendants in 1972. Both of the 1972 groups of defendants were dismissed by Judge McMillen, on their motion, and, on appeal, the dismissal was affirmed as to one group and reversed as to the second group, thus restoring the second group of defendants back into the case. Additional evidence ascertained in discovery and only peripherally suggested in the criminal trial was the attempt of the corporation Hercules-Galion to enter into a merger at the time the stock was near its apex despite declining earnings.

Several defendants pleaded guilty to the criminal charge, others were convicted and two were either acquitted or not retried after a hung jury. The U.S. Attorney asserted that the general public lost approximately 4 million dollars as a result of this manipulation. The amount of damages is in dispute in the case below. All persons convicted received extremely light jail sentences; the most serious is believed to have been one year. Most of the sentences ranged from 3 months to 6 months. The manipulation involved the classical old time form of a group of people, including brokers, creating a boiler-shop type operation of the stock by "painting the tape" in a masterful, coordinated effort between several brokerage houses in New York and Chicago, and pushing it with rumor and story. Some of the conspirators took money and free stock secretly in order to promote the manipulation. It should be noted that in the decision of the Seventh Circuit Court of Appeals, the court determined

that the president and chief operating officer of the company, Hercules-Galion, Charles Meyers, who is also a director (the fourth of seven directors), was considered by the court to have had a deep involvement in the conspiracy. Meyers had not been named by the U.S. Attorney and was part of the second group of 1972 defendants who were dismissed by Judge McMillen and restored to the case by decision of the Seventh Circuit.

These petitioners seek review only from so much of that order of the Seventh Circuit Court of Appeals that affirms the dismissal by the District Court of Count II, the anti-trust count alleged by the plaintiffs, involving the anti-trust violations. There seems to be no doubt or dispute about the fact of the manipulation; there is disagreement as to the persons who are responsible for it and whether the anti-trust laws may be applied in addition or in lieu of the securities laws.

REASONS FOR GRANTING THE WRIT

I.

THE APPLICATION OF THE ANTI-TRUST LAWS TO A SECURITIES PRICE-FIXING SITUATION IS AN IMPORTANT LEGAL ISSUE FOR THE COURT TO RESOLVE.

The emphasis both in Congress and in the economic climate of our times is for the application of anti-trust laws both as a historic basis founded in law, in statute and in economic necessity for the preservation of our way of life. The issue here also involves a very narrow but very important overlap of Anti-Trust and Securities Laws as well as the question of implied repeal, as discussed more fully hereafter.

It is quite apparent from the status of individuals involved in this conspiracy and manipulation, brokers, bankers, presidents of corporations, officers and directors, that the penalties of the securities laws are no deterrent whatsoever to active, old time securities manipulation. Apparently, high level people are still willing to take the risk of a slap-on-the-wrist jail sentence which has become the vogue and practice in return for the chance of reaping large financial returns which, even though later detected, will not result in financial regurgitation of the benefits for many years thereafter and then usually only at a compromise of the original amount taken.

We do not propose a situation where there is widespread application of the anti-trust laws to securities violations that result from negligent or intentional nondisclosure of information and other violations prohibited by Section 10(b) and Rule 10(b)5. We are dealing with a narrow spectrum of cases that involve classical, insidious

market manipulations in the worst sense. Where such clear, obvious market manipulations and price-fixing also fall within the ambit of the anti-trust laws there is no reason to deny the statutory remedy which falls clearly within the language of the Sherman and Clayton Acts. To permit the decision of the Seventh Circuit to stand would be a denial of rights under the Sherman Act and encourage the same type of fraud on the part of individuals willing to take the chance and institutions so interested in additional revenue that they are willing to close their eyes to the activities of their controlled persons. Based on most settlements and recoveries the application of treble damages probably would have no greater result in the average case than restoring the losses in full to the people involved. The practical results in the reported cases that do not have the benefit of these laws do not permit effective full recovery.

II.

THE DECISION OF THE SEVENTH CIRCUIT IS INCONSISTENT WITH AND MISCONSTRUES THE SUPREME COURT DECISION IN U.S. vs. PATTEN, 226 U.S. 525, 33 Sup. Ct. 141, 57 L. Ed. 333 (1912).

The Seventh Circuit, in distinguishing Patten from the instant case, has misinterpreted, misconstrued and misapplied that Supreme Court decision.

Patten was a criminal action under Sec. 1 of the Sherman Act charging a conspiracy to restrain trade by way of a price fixing scheme in the trading of cotton on the New York Cotton Exchange. The complaint detailed an attempt by defendants to create excessive artificial prices in the cotton commodity by a corner in the cotton market. The court held that the attempt to control prices in

cotton by the methods charged in the complaint did constitute a valid criminal action under the Sherman Act, and reversed the sustaining of the demurrer to the complaint by the District Court. With respect to arguments that the Sherman Act is restricted to certain restraints at common law, the court quoted *Standard Oil* v. *United States,* 221 U.S. 1, 59 as follows:

> •"The context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice have come to be considered as in restraint of trade in a broad sense."

The court further defined the breadth of Section 1.

> Section 1 of the act, upon which the counts are founded, is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints: as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein.
> (all 57 L.Ed. at p. 341)

The opinion contains additional language that applies to the instant stock market manipulation scheme. The instant complaint alleges conduct on the part of defendants that tended to stimulate the market relative to Hercules-Galion stock and thereby create an artificial price and demand.

In *Patten* it was argued that the market corner tended to stimulate competition as opposed to suppressing it and therefore was not within the restraint of trade concept of the Sherman Act. In rejecting this the Court stated at p. 341 (L.Ed):

> "It well may be that running a corner tends for a time to stimulate competition: but this does not prevent it from being a forbidden restraint for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of completion."

Noting that the ultimate objective of the corner in the supply of cotton was the enhancement or the fixing of the price for the commodity upon the Exchange, the Court further stated on p. 341:

> "The corner was to be conducted on the Cotton Exchange in New York city, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy •upon the attainment of which is conceded its success depended."

The close analogy between a commodity market cornering scheme and a stock market manipulation scheme as a method to control prices in violation of the Sherman Act was indicated by dictum in a subsequent Supreme Court case, *Board of Trade of Chicago* v. *Olsen*, 262 U.S. 1, 43 S. Ct. 470, 67 Law Ed. 839 (1923). This decision rejected an attack on the constitutionality of the Grain Futures Act of 1922 and the opinion recites that one of

the evils intended to be prevented by the statute was the "prevention of manipulation of prices or the cost of grain by dealers or operators of the Board."

The court cited the above *Patten* case as the decision which brought the control of prices on the Exchange by means of a market corner within the prohibition of the Sherman Anti-Trust Act. Using then the close analogy between a market cornering scheme and a manipulation scheme as legally identical methods for achieving control prices, the court sustained its position that both evils constitued a direct burden on commerce as follows on p. 851-2:

> "If a corner and the enhancement of prices produced by buying futures directly burden interstate commerce in the article whose price is enhanced, it would seem to follow that manipulations of futures which unduly depress prices of grain in interestate commerce and directly influence consignment in that commerce are equally direct. The question of price dominates trade between the states. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it."

The Seventh Circuit decision in the instant case has failed to properly apply *Patten* to the instant case.

III.

THE SEVENTH CIRCUIT DECISION IS IN CONFLICT WITH OTHER CIRCUIT COURT DECISIONS IN THE SAME GENERAL AREA OF RESOLVING LIMITED JURISDICTION OF ANTI-TRUST LAWS IN CERTAIN AREAS THAT NARROWLY OVERLAP WITH SECURITIES LAWS.

Cargill, Inc. v. *Board of Trade of the City of Chicago*, 164 Fed. 2d 820 (7th Cir. 1947) was an anti-trust action

charging a price fixing conspiracy by reason of ban by the Board on certain futures contracts. The trial court dismissed the action and the Seventh Circuit Court affirmed but on the ground that the acts charged in the complaint were not, in fact, price fixing within the meaning of the Sherman Act. The court stated, however, that if the acts charged had been price fixing the court would have sustained the complaint as stating unreasonable restraint prayed under the Sherman Act, stating on p. 823:

> "We have been cited cases such as *United States* v. *Socony-Vacuum Oil Co., Inc., et al* 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129, and *United States* v. *Trenton Potteries Company et al.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700, 50 A.L.R. 989. These cases do not define and delineate what is price-fixing. They go only to the proposition that if there is price-fixing, it is *per se* an unreasonable restraint of trade."

Stock market manipulation schemes, notwithstanding their general prevalence in the market in recent years, have rarely found their way into reported decisions. Such a scheme, however, by way of its creating an artificial price for stock, either up or down, through increased activity is but another price control scheme banned by the Sherman Act. The analogy with the foregoing decisions is too close for any other conclusion.

The Circuit Court decision also is in conflict with and misinterprets the case of *SSW, Inc.* v. *Transport Association of America,* 191 F.2d 658 (DC, Cir. 1951)

This securities case has all the elements actionable under the Sherman Act. The question here is whether this status was in any way altered in 1933 and 1934 by the Securities Act. This issue exists here as elsewhere

in a context that an implied repeal of the antitrust laws is to be strongly disfavored.

The key is of course Sec. 28 of the 1934 Act, together with the comparable language of Sec. 16 of the 1933 Act which preserve "all other rights and remedies that may exist at law or in equity." Defendants contend this language is limited to state securities rights and remedies such as blue sky laws and common law remedies existing on or before the passage of the Securities Acts.

Of course, these provisions preserve state remedies, but it is simply wrong to conclude that only state remedies are preserved. The words "all" or "may" clearly indicate a congressional attempt (1) to preserve any and all remedies, federal or state and (2) not to decide the extent of such remedies, a judicial, not a legislative function. In short, *Congress intended no bar of the door to any remedy, state, federal or otherwise.* Thus, if any remedy existed under the Sherman Act for market manipulation as we have shown, it survived, so far as Congress was concerned, the 1933 and 1934 Securities Acts.

This would seem dispositive of the argument except that Judge Decker followed by defendant's counsel have seized upon the single damage limitation of Sec. 28 as an instrument of antitrust repeal in this area. To state the proposition is to see its error; it is akin to suggesting that a hand shovel is made to move a mountain. This damage limiting provision is most reasonably construed to apply to the legislation of which it is a part, the 1934 Act. The subject of how it applies, e.g., punitive damages and the extent of application, to the 1933 Act and the pendant common law fraud liability is a subject of much legal debate but not an issue in this appeal.

To extend this provision to an independent statutory framework such as the antitrust laws, absent very specific direction by Congress, is judicial legislation pure and simple.

To support the argument that the antitrust laws are abrogated in the manipulation area by the Sec. 28 damage limitation provision, defendants rely on a group of cases cited by Judge Decker. Particular reliance was placed upon *S.S.W., Inc.* v. *Air Transport Association of America,* 191 Fd.2d 658 (D.C. Cir. 1951) which involved the regulated air transport industry and application of the Sherman Act. Plaintiffs sued under the Sherman Act for injunctive and treble damage relief against a group of mainly scheduled air lines. The court opinion distinguished the premises of this case plus others cited by Judge Decker and the defendants in terms of the type of regulated industry involved. A regulated industry there meant those such as public utilities where free competition was limited or abrogated in preference to a governmental grant of monopoly power, all in the public interest. As stated on p. 661:

> "The aircraft industry, like railroads and power, is one in which Congress has decided that the public interest is best served, not by free competition, but rather by direct and uniform regulation by an "agency authorized to supervise almost every phase of the regulated company's business".

The securities industry is of course a regulated industry, but not in the sense that free competition is suppressed in the public interest. The exact opposite is of course true with the result that any kind of free market suppression such as market manipulation is banned by the Securities Acts and as always by the antitrust laws.

The amazing point however, is *notwithstanding the permitted monopoly area of S.S.W. Inc., the court there held that plaintiffs had a valid antitrust claim for treble damages.* It stated squarely in line with plaintiffs' argument here the following on p. 664:

> "What we are saying is that *the same set of facts may give rise to both a violation of the Civil Aeronautics Act and a violation of the antitrust laws. Although the second does not necessarily follow from the first but is bottomed upon its own statutory standards, the antitrust remedy of treble damages is not defeated by the fact that the Civil Aeronautics Act is also violated*".

The principal factor there was a remedy saving clause in the Civil Aeronautics Act like in Sec. 28 here. A second factor was the absence of a specific damage provision in the Act which is also similar to the instant matter. No specific damage provisions are provided in Sec. 17 of the 1933 Act and 10(b) of the 1934 Act, the primary bases for Count I here.

Furthermore, the court did not decide for the purposes of this decision whether or not plaintiffs had any kind of damage remedy for violations of the Civil Aeronautics Act. It merely decided as plaintiffs contend here that the two violations could and did exist side by side.

A stock market manipulation as alleged here is unique in that it combines the elements of Securities Acts fraud and a price fixing conspiracy under the Sherman Act. *There are of course many potential actions under Sec. 10(b) and Sec. 17 that would not contain conspiracy, price fixing* violations of the Sherman Act.

IV.

THE SEVENTH CIRCUIT DECISION AFFIRMS A LOWER COURT OPINION THAT IS IN DIRECT CONFLICT WITH OTHER OPINIONS IN THIS DISTRICT AND IN OTHER CIRCUITS.

Judge Decker's 1970 decision in this cause is a lonely exception to other decisions in this district and other circuits, which, while citing the decision, reached the exact opposite conclusion in permitting punitive damages to be recovered in a securities action so long as the punitive damages were recoverable under another count not containing securities allegations. The other decisions dealt mainly with common law fraud.

In this district, Judge Austin so decided in *Burkhart* v. *Allson Realty Trust,* 363 F. Supp. 1286 (N.D.Ill. - 1973). In a 10 (b) securities fraud action pp. 1290-2, Judge Austin analyzed the matter, including Judge Decker's *Schaefer* opinion and concluded that punitive damages are recoverable under the pendent count as part of Illinois common law fraud. The base rationale was that §28 of the 1934 Act expressly reserved state rights and remedies.

Punitive damages were held recoverable by the Tenth Circuit in *Young* v. *Taylor,* 466 F 2nd 1392 (1972) at pp. 1337-8, citing, but also disagreeing with, Judge Decker. Likewise, in the Southern District of New York in a vast securities fraud litigation, *In Re Caesar's Palace, Securities Litigation,* 360 F.Supp. 366, 393-4 (1973), punitive damages were held recoverable under the pendent count. The Court relied on a prior case from that district, *Gann* v. *BernzOmatic,* 262 F.Supp. 301 (S.D.N.Y.—1966) and the Tenth Circuit decision, *Young* v. *Taylor, supra.*

The Fifth Circuit put it succinctly when it stated in *Coffee* v. *Permian Corp.,* 474 F.2d 1040 (1973) another 10 (b) fraud action at p. 1044

> "• • • Federal law is not clear concerning exemplary damages in 10b-5 lawsuits, but that need not trouble us here. By way of pendent jurisdiction a violation of state law is also present and it is well established that exemplary damages may be awarded if allowable under state law when a state law violation is joined with the 10b-5 complaint. *Young* v. *Taylor,* 10 Cir. 1972, 466 F. 2d 1329. See also *Herpich* v. *Wallace,* 5 Cir. 1970, 430 F. 2d 292."

One cornerstone of Judge Decker's denial of the antitrust count was his belief that punitive damages could not be recovered in a securities action, even in a non-securities count. That is clearly refuted by the foregoing decisions allowing punitive damages under pendent common law counts. Therefore, the treble damages allowed under the antitrust laws would comport with those decisions.

CONCLUSION

For the reasons stated above, this Honorable Court should grant the petition of Certiorari brought herein by Robert Schaefer, et al., and the class represented solely on the issue of the application of the Sherman Anti-trust Act to a conspiracy to fix the price of a security.

Respectfully submitted,

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APPENDIX

DECISION ON MOTION OF DEFENDANT RODMAN & RENSHAW, INC., BY JUDGE McMILLEN ON JUNE 25, 1973

The defendant Rodman & Renshaw Inc., has now filed a motion for judgment on the pleadings, having previously failed in its motion for summary judgment (order entered January 9, 1973). Although successive motions of this kind are to be discouraged for various reasons, these reasons do not require a preemptory denial of the motion. In this particular instance we find the motion to be well-founded.

The allegations of the Amended Complaint against this defendant are too conclusory to satisfy the specific pleading requirement of F.R.C.P. 9(b). *Segal* v. *Gordon,* 467 F. 2d 602 (2d Cir. 1972); *Robison* v. *Caster,* 356 F. 2d 924, 927 (7th Cir. 1966). We can only assume that the plaintiffs, despite the lengthy history of this case, have no specific evidence of fraud or conspiracy against Rodman & Renshaw Inc., other than the acts of its departed employee Nagorsky. Fortuitously for Rodman & Renshaw, Nagorsky left more than three years before the Complaint was filed, and no concealment by Rodman & Renshaw is alleged.

We see no reason not to give retroactive effect to *Parrent* v. *Midwest Rug Mills Inc.,* 455 F. 2d 123 (7th Cir. 1972). The Illinois statute on which it is based was first enacted in 1953, and thus has been part of the Federal law since then, only recently declared. Therefore the requirements for non-retroactivity laid down by the Supreme Court in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971) have not been satisfied in the case at bar. Cf. *Dasho* v. *Susquehanna Corp.,* 461 F. 2d 11, 21 (7th Cir. 1972), *cert. den.,* 92 S. Ct. 2496, 2498 (1972).

It is therefore ordered, adjudged and decreed that the motion of defendant Rodman & Renshaw Inc. for judgment on the pleadings is granted, and judgment is entered in its behalf on the First Amended Complaint, as amended.

ENTER:

/s/ THOMAS R. McMILLEN
Judge U.S. District Court

June 25, 1973

DECISION ON MOTIONS TO CLARIFY PREVIOUS ORDERS AND TO MAKE ORDERS OF JUNE 25, 1973 FINAL AND APPEALABLE BY JUDGE McMILLEN ON SEPTEMBER 13, 1973

Plaintiffs have moved for a clarification of our two orders entered June 25, 1973 which dismissed the Amended Complaint as to certain defendants. Plaintiffs assert that there are irreconcilable differences between the two orders and that the status of the Amendment filed in 1972 is unclear. On the latter point, we ruled on June 25, 1973 that "the Amendment filed October 18, 1972 to the First Amended Complaint is stricken." That was intended to dispose of the Amendment as to all defendants added by it and needs no further elaboration.

Plaintiffs also contend that we ruled inconsistently on June 25, 1973 concerning the application of the statute of limitations to defendant Rodman & Renshaw and to the defendants added by the 1972 Amendment. In our order of January 9, 1973, Rodman & Renshaw was denied summary judgment on the ground of the 3-year limitation because the complaint contained allegations that a conspiracy continued until at least August 23, 1967, within three years of the filing of the original complaint. Aside from the alleged conspiracy, however, the statute had run as to Rodman & Renshaw when its participating employee Nagorsky departed in 1965, and it was not tolled by fraudulent concealment. In the subsequent order of June 25, Rodman & Renshaw was granted judgment on the pleadings on the ground that the conspiracy allegations failed to meet the requirements of F.R.C.P. 9(b).

Also on June 25, we dismissed as to the defendants added by the 1972 Amendment on the ground that plaintiffs had not exercised due diligence after 1967 to toll the running of the 3-year statute as to those defendants. Plaintiffs did not contend that the non-discovery doctrine, rather than the fraudulent concealment doctrine, tolled the statute as to Rodman & Renshaw. It was not raised

in connection with the January 9 order, nor was it raised in the briefs preceding the June 25 order. The issue presented as to Rodman & Renshaw was fraudulent concealment and plaintiffs lost. Plaintiffs had an additional ten days after June 25, 1973 to take the next step and raise the legal issue of non-discovery. *Swan* v. *United States*, 327 F. 2d 431, 433 (7th Cir. 1965), *cert. denied*, 379 U.S. 852 (1964). However, they waived it when they delayed until filing the instant motion on July 17. If this appears to be an unreasonably strict approach, one need only look at the number of motions and orders filed in this case. Even complex litigation must be brought to an end someday.

We note in passing that we did not rule, as Rodman & Renshaw contends, that the non-discovery doctrine does not apply where derivative liability is alleged. We did not reach this point because it was not timely raised.

Plaintiffs finally contend that since they found out about the involvement of defendant Charles Myers from two depositions which could not have been taken before 1972, they have at least established their due diligence with respect to him. However, their lack of diligence in general has not been effectively contradicted; they did not show that they could not have found out about Myer's alleged participation through other available sources. Furthermore, this point could only have been raised under Rule 59(e) within the days of June 25, 1973 and it was not.

Certain defendants dismissed out by the orders entered June 25, 1973 now move that there is no just reason to delay entering final judgments in their favor pursuant to F.R.C.P. 54(b). Plaintiffs have filed a conditional motion that, if we grant the defendants' motion, we make the same determination for all defendants dismissed out on that date. They object to defendants' motion, however, on the ground that it was untimely filed.

A strict thirty-day limit was invoked by the Seventh Circuit on plaintiffs' motion seeking a Rule 54(b) review

at an earlier stage of this litigation. *Schaefer* v. *First National Bank of Lincolnwood,* 465 F. 2d 234 (7th Cir. 1972). The court ruled that the thirty day period can be extended only when there is "extreme hardship where dilatoriness is not occasioned by neglect or carelessness".

Plaintiffs object that defendants' motion was not formally filed until July 27, two days after the thirty-day limit. However, the motion was in fact brought to chambers and stamped "Received" on July 24. It was not stamped "Filed" until the date the parties appeared on the motion call, in accordance with the practice of our clerk's office. The motion was therefore not untimely made.

In the alternative, should it be considered on appeal that defendants are bound by the date on which the motion was officially stamped "filed," we find and conclude that the failure to meet the July 25 deadline was a clerical error or misunderstanding and was not caused by neglect or carelessness. Otherwise defendants would be required to deliver their motion to the clerk within less than 30 days in order to have it heard and filed within 30 days.

On its merits, the defendants' motion should be granted. They seek to end their involvement in this litigation by way of limitations and not on the merits. This case is now four and a half years old and may continue for an indefinite period before it is concluded at the trial level. In these circumstances, we see no just reason why the defendants whom we have found not to be involved in the merits should remain in suspense concerning their ultimate liability or should be required to participate in any appeal involving the merits.

The plaintiffs' conditional motion for a Rule 54(b) order applicable to all defendants dismissed out by our orders of June 25 should also be granted. The non-moving defendants are in the same position as the movants, and an appeal from our orders, if any is taken, should cover all of these defendants.

It is therefore ordered, adjudged and decreed that the judgment entered on June 25, 1973 dismissing the Amended Complaint as to the American Stock Exchange, Rodman and Renshaw, Inc., John Risetto, Al Vernieri, Edward Crooks, Frank Alter, Charles Myers, Wilbur Gorman, Arthur Dickholtz, Jerry Fogelman and David Fogelman is final, pursuant to F.R.C.P. 54(b).

ENTER:

/s/ THOMAS R. MCMILLEN
Judge, U.S. District Court

Dated: September 13, 1973

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 73-2128

ROBERT SCHAEFER AND SANDRA SCHAEFER,
Plaintiffs-Appellants,

vs.

FIRST NATIONAL BANK OF LINCOLNWOOD, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 69 C 364
Thomas R. McMillen, Judge

ARGUED SEPTEMBER 20, 1974—DECIDED JANUARY 30, 1975.

Before CASTLE, *Senior Circuit Judge,* FAIRCHILD and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* Plaintiffs, private parties suing individually and as a class, appeal from unfavorable summary judgments and orders dismissing their complaint alleging common law fraud, violations of the Securities Acts and violations of the Sherman and Clayton Antitrust Acts.

The plaintiffs purchased Hercules-Galion Products, Inc. stock during a period of market manipulation between 1965 and 1967. They have based their civil claims on events which were grounds earlier for criminal prosecutions in the Southern District of New York. *United States* v. *Projanski, et al.,* 67 CR 729, *aff'd.,* 465 F. 2d 123 (2d Cir. 1972). Named as defendants here were the criminal defendants and the non-indicted co-conspirators of the *Projansky* case[1] and a number of additional non-criminal parties, including several brokerage houses and their salesmen and others. The defendants who are appellees in this appeal include the brokerage house of Rodman & Renshaw; the American Stock Exchange (AMEX) and a group of its specialists, John Rissetto, Al Vernieri, Edward Crooks and Frank Alter; Charles F. Myers, the former president of Hercules-Galion Products, Inc.; Wilbur A. Gorman, chief operating officer of the brokerage house of Link, Gorman & Peck Co.; Arthur Dickholtz, an officer of the First National Bank of Lincolnwood; and Jerry and David Fogelson, partners in Investment Associates. These defendants successfully argued in the district court that the claims against them based on the Securities Acts were time barred and that the antitrust laws do not apply to securities market rigging schemes. Consequently, the district court dismissed the suit against them. These same contentions are at issue on appeal. We reverse in part and affirm in part.

I

The original complaint in this action alleged substantially the same events as were alleged in the criminal indictment returned in New York. The original complaint sought relief from common law fraud; violations of

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[1] These are Irving Projansky, Harry Brainin, Gerald Leavitt and Michael Geier, the four appellants in *United States* v. *Projansky,* and Arthur Keller, Stuart Projansky (Irving's son), Fred Weitz, Mark Rolland, Spero Furla, Murray Peltz, Burton Buddy Kozak, Harris Nagorsky, Herbert Werman, Edward Wetzel, Zafe Zafer, and David Zisfein. Named as co-conspirators but not as defendants were Morris and Eva Childs, George Georges, Irving Taub, the First National Bank of Lincolnwood, and Argus Capital Corporation. *United States* v. *Projansky,* 465 F. 2d 123, 124, n.1 (2d Cir. 1972).

section 1 of the Sherman Act (15 U.S.C. §1), sections 1, 4, 5, 12 and 16 of the Clayton Act (15 U.S.C. §§12, 15, 16, 22 and 26); sections 15, 16, 17(a), and 22 of the Securities Act of 1933; (15 U.S.C. §§77o, 77p, 77g and 77v) and sections 9(a)(2), 10, 27 and 28 of the Securities Act of 1934 (15 U.S.C. §§78i, 78j, 78aa and 78bb).

In addition, however, to the sixteen criminal defendants and the six non-indicted co-conspirators, the plaintiffs named the seven brokerage houses employing some of the criminal conspirators. Among these was Rodman & Renshaw, the house which employed Harris Nagorsky, a Chicago broker who from the first figured prominently in the scheme, and Edward Wetzel. Rodman & Renshaw was generally charged in the original complaint with conspiring to defraud the plaintiffs. It was specifically charged with failing to supervise Nagorsky and thereby aiding and abetting the alleged conspiracy, fraud and stock manipulation. The plaintiffs broadened these claims in subsequent pleadings.

Briefly the facts are these.[2] Between July 1, 1965 and August 23, 1967, the sixteen criminal defendants conceived and executed a plan to manipulate the price of Hercules-Galion (Hercules) stock. By a furious promotion campaign, the group was able to raise the price of Hercules stock from $6 to over $14 per share. The heart of the scheme was for the defendants to regularly purchase from among themselves large blocks of Hercules stock on the AMEX at prearranged prices. The price was slowly raised by design, and as public interest and the price increased, the stock was sold and the profits taken.

After the criminal indictments were returned by a New York federal grand jury on August 23, 1967, the

[2] For a complete history of the manipulation scheme consult the Second Circuit's recounting of the facts in *United States* v. *Projansky, supra* at 124-35.

allegations were published immediately in many newspapers and news magazines. One and one-half years later, on February 19, 1969, the plaintiffs filed their original complaint. Of those now on appeal, only the defendant Rodman & Renshaw was named in the original complaint.

The first amended complaint was filed on July 25, 1969. Again, of the defendants here on appeal, only Rodman & Renshaw was named. Substantially the same allegations were repeated.

In the fall of 1969, both the plaintiffs and the defendants made the several pretrial motions. The plaintiffs moved for discovery and the defendants sought dismissal of the action. Discovery of the criminal defendants was stayed until their criminal trial was completed. The antitrust claims against the defendants were dismissed. The district court held that the securities acts allegations and the common law fraud allegations stated claims for relief. The court, applying the Illinois five year statute of limitations for fraud, also found the securities acts claims timely.

Subsequently, two events took place setting the stage for this appeal. The first was the end of the criminal trial wherein all of the indicted conspirators were convicted. Discovery resumed and proceeded on schedule, first with the taking of the depositions of the individual criminal defendants followed by that of the brokerage houses representatives. On October 18, 1972, the plaintiffs filed their amendment to the first amended complaint adding as defendants the AMEX, the specialists, and Myers, Gorman, Dickholtz and the Fogelsons. The second event was this court's decision in *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972). In *Parrent* we held that Rule 10-b-5 actions were subject to the three year limitations period contained in the Illinois Securities Act.

At this point, Rodman & Renshaw and all the defendants added in the newly amended complaint moved for summary judgment in the light of the shorter limitations period announced in *Parrent*. The district court then found the three year period applicable and ordered the dismissal of all three counts, including the securities and common law fraud claims and the antitrust claims which had been re-alleged. This order was made final under Rule 54(b), FED. R. CIV. P., and is the subject of this appeal. The plaintiffs contend that their suit against Rodman & Renshaw as well as all the other non-criminal defendants is timely, and that the district court erred in dismissing all their claims against the defendants.

II

Plaintiffs contended that they have an implied right of action under section 10(b) of the 1934 Act and Rule 10b-5 and under section 17 of the 1933 Act. The defendants contended that plaintiffs' sole relief lies under section 9 of the 1934 Act. The original complaint stated a claim for relief averring market manipulation of the price of Hercules stock. The defendants argued that section 9(a)(2) specifically prohibits the conduct which the complaint alleges. Arguing that a claim may not be duplicated within the framework of a single act in derogation of its specific limitations, the defendants concluded that the claims based on Rule 10b-5 and section 17 may not be raised in this case.

A

Section 10(b) of the 1934 Act and Rule 10b-5 provide a private claim for relief from market manipulation.[3]

[3] *See* 6 Loss, SECURITIES REGULATION 3869-73 (Supp. 2d ed. 1969); 3 Loss, SECURITIES REGULATION 1763 *et seq.* (2d ed. 1961). *Cf. Tcherepnin* v. *Knight*, 389 U.S. 332; *J. I. Case Co.* v. *Borak*, 377 U.S. 426; *Supt. of Insurance* v. *Bankers Life & Cas. Co.*, 404 U.S. 6 (1971).

Section 10(b)[4] and Rule 10b-5[5] have been liberally construed by the Supreme Court and include private actions arising from manipulative stock transactions. In *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1971), the Court recognized a private right of action where the claim for relief based on Rule 10b-5 arose from a stock rigging scheme. By fraudulently misstating the prevailing market price of Ute Distribution Corporation stock, the defendant bankers artificially depressed its purchase price. Once they bought the stock, the defendants then sold it at its higher, true market value. Finding this practice unlawful, the Court remarked on the scope of secton 10(b) and Rule 10b-5:

> These proscriptions, by statute and rule, are broad and, by repeated use of the word "any," are obvi-

[4] Section 10(b), 15 U.S.C. §78j(b), provides:

> It shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[5] Rule 10b-5, 17 C.F.R. 240.10b-5, provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in an act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

ously meant to be inclusive. The Court has said that the 1934 Act and its companion legislative enactments embrace a "fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963). In the case just cited the Court noted that Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes." *Id.*, at 195. This was recently said once again in *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971). 406 U.S. at 151.

Similarly this Circuit has recognized a private implied right under 10b-5 where the defendant's conduct only threatened to create artificial market conditions. *Carroll* v. *First National Bank of Lincolnwood*, 413 F.2d 353 (7th Cir. 1969).

The remedies provided by section 10(b) as well as the other sections of the securities acts are cumulative and not mutually exclusive. In *Jordan Building Corporation* v. *Doyle, O'Connor & Co.*, 401 F.2d 47 (7th Cir. 1968), this Circuit took what it called the "direct approach" in allowing a private plaintiff to bring an action under Rule 10b-5 although the conduct alleged fell squarely within either section 12 of the 1933 Act or section 15 of the 1934 Act. The defendants contended that the plaintiffs attempted to avoid the limitations period of specifically applicable sections of the securities acts by making their claims under section 10(b) and Rule 10-b-5. The defendants went on to argue, as the defendants do here, that the specific sections were exclusive remedies.

Recalling the broad Congressional intent expressed in the language of section 10(b) and the serious remedial purposes of the Acts, the *Jordan* court concluded that the "remedies supplied by and under these acts are

cumulative and not mutually exclusive." 401 F.2d at 51. By this same approach, the remedies afforded by section 9(a)(2) are not, as the defendants contend, the plaintiffs' sole remedy for market manipulation. The plaintiffs may make their claim for relief under Rule 10b-5 even though the alleged market rigging scheme also falls squarely within section 9(a)(2). Their remedies are cumulative. They may make their claim for relief under either or both or several sections of the acts.

In two cases the Securities and Exchange Commission found a series of stock transactions resulting in an artificial market to be violative of both Rule 10b-5 and section 9(a)(2). In *Adams & Co.*, 33 SEC 444 (1952), the Commission revoked the registration of two broker dealers when they conspired with a third person to raise the price of Mohawk Distillery stock by fraudulently creating apparent activity in the stock on the Chicago Board of Trade. The parties falsified records, reported false bids and offers and engaged in a series of prearranged sales and purchases at increasingly higher prices, causing the price of the stock to become artificially inflated. The Commission found simultaneous violations of sections 10(b), 17(a), 9(a)(2) and Rule 10b-5. In *Thornton & Co.*, 28 SEC 208 (1948), *aff'd sub nom. Thornton* v. *Securities and Exchange Commission*, 171 F.2d 702 (2d Cir. 1948), these sections were all found applicable to a single scheme of market manipulation. The facts which supported a section 9(a)(2) claim also gave rise to an equally valid Rule 10b-5 claim. We will leave it to the private plaintiff to make his claims under either Rule 10b-5 or 9(a)(2) or both. The allegations of the pleadings in the case contain elements of both. The Rule 10b-5 claim is therefore appropriate.

B

The defendants have attacked the sufficiency of plaintiffs' section 17 claim on the grounds that (1) no right of action can be implied under section 17 and (2) the parties are not in privity. The defendants' argument has

assumed that plaintiffs' Rule 10b-5 claim will be dismissed leaving section 17 to stand alone.

While there is authority in this Circuit for sustaining an implied right of action under section 17 alone,[6] we need not deal directly with this issue. There is an implied right of action under section 10(b) and Rule 10b-5. Judge Friendly's concurrence in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied, sub nom. Coates* v. *SEC*, 394 U.S. 976 (1968), often cited for denying implication, acknowledged that:

> Once it had been established . . . that an aggrieved buyer has a private action under § 10(b) of the 1934 Act, there seemed little practical point in denying the existence of such an action under § 17—with the important proviso that fraud, as distinct from mere negligence, must be alleged. See Fischman v. Raytheon Mfg. Corp., 188 F.2d 783, 787 n.2 (2 Cir. 1951); Weber v. C. M. P. Corp., 242 F. Supp. 321, 322-325 (S.D.N.Y. 1965) (Wyatt, J.); Thiele v. Shields, 131 F. Supp. 416, 419 (S.D.N.Y. 1955) (Kaufman, J.). 401 F.2d at 867.[7]

Since fraud as well as negligence has been alleged and the section 10(b) claim established, plaintiffs' section 17 claim will be allowed to stand.

Similarly, we need not deal with defendants' contention that section 17 has a privity requirement. Where section 17 has been concurrently pleaded with a sufficient Rule 10b-5 claim, as here, courts forbear to rule on the sufficiency of the section 17 claim. 6 Loss, Securities Regulation 3913 (Supp. 2d ed. 1969).

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[6] *Surowitz* v. *Hilton Hotels Corporation*, 342 F.2d 596, 604 (7th Cir. 1965), *rev'd on other grounds*, 383 U.S. 363 (1966). *But compare Reid* v. *Mann*, 381 F. Supp. 525 (N.D. Ill. 1974), and authorities cited there.

[7] *See also Dauphin Corp.* v. *Redwall Corp.*, 201 F. Supp. 466, 469 (D. Del. 1962).

III

Every defendant appealing here has contended that the statutory period within which to bring a Rule 10b-5 action is three years. Each has further contended that this period expired before the plaintiffs' filed their various complaints. Since the defendants stand in different factual circumstances, they must be dealt with separately.

This Circuit determined in *Parrent* v. *Midwest Rug Mills*, 455 F.2d 123 (7th Cir. 1972), that Rule 10b-5 and section 17 actions arising in Illinois were subject to a three year statute of limitations. Since no federal provision limits Rule 10b-5 actions, the *Parrent* court looked to the law of the forum state, Illinois, for the statute of limitations which best effectuated the policies of Rule 10b-5 and section 17. This was held to be the three year limitation found in section 13 of the Illinois Security Law.

The plaintiffs contend that Illinois' five year statute of limitations for fraud applies. Judge Decker applied this limitation at an earlier stage in this litigation before the *Parrent* case was decided. Subsequently Judge McMillen, succeeding Judge Decker in this action, found the three year limitation applicable on the basis of *Parrent*. The plaintiffs urged that the five year limitation is "the law of the case." They also argued that *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), precluded retrospective application of *Parrent*.

The doctrine of the law of the case did not bind Judge McMillen to apply the five year limitations period. Federal rule of the case doctrine is a rule of practice. It does not limit a court's power. *Messenger* v. *Anderson*, 225 U.S. 316, 319 (1922); *Drinan* v. *A. J. Lindermann & Hoverson Co.*, 238 F.2d 72, 74 (7th Cir 1956). A district judge has the power to undo the work of his predecessor

in the same action. *Bowles* v. *Wilke*, 175 F.2d 35 (7th Cir. 1949).[8]

Although the parties there did not raise the issue of retroactivity, we applied *Parrent* retroactively in *Hupp* v. *Gray*, 500 F.2d 993 (7th Cir. 1974). Under *Chevron*, *supra*, the doctrine of nonretroactivity is applied when those invoking it receive favorable consideration on three separate factors. As set out by the Supreme Court these are:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e.g., *Hanover Shoe* v. *United Shoe Machinery Corp.*, *supra*, at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, e.g., *Allen* v. *State Board of Elections*, *supra*, at 572. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker*, *supra*, at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma*, *supra*, at 706. *Chevron* v. *Huson*, 404 U.S. at 106-07.

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[8] The rule of the law of the case may have a different effect upon a federal court in a diversity case where a state court has previously acted. *Barrett* v. *Baylor*, 457 F.2d 119, 123-24 (7th Cir. 1972).

The first factor for consideration is decisive. Although the statute of limitations issue was one of first impression in *Parrent*, the *Parrent* court did not overrule "clear past precedent." The court said:

> It is clear that under the resemblance test the three year limitation in Section 13, subd. D of the Illinois Securities Law (Ill. Rev. Stat. ch. 121 1/2, § 137.13, subd. D) applies to the 10b-5 actions stated in Counts I and II.
>
> The three year limitation is . . . closer to the express limitation periods in the various sections of the federal act . . . Furthermore, logic dictates selection of the three year Illinois limitation as tending more toward an orderly development of law, than reaching into a different Illinois Act (Ill. Rev. Stat. ch. 83 § 16) for the appropriate limitation. 455 F.2d at 127.

Before *Parrent*, circuit courts forced to choose between a state's fraud or Blue Sky statute of limitation used the "resemblance test" *Charney* v. *Thomas*, 372 F.2d 97 (6th Cir. 1967); *Vanderboom* v. *Sexton*, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970). They looked to the limitations period of the state action which was most like section 10(b) or Rule 10b-5. Ruder, *Limitations on Civil Liability Under Rule 10b-5*, 1972 *Midwest Rug Mills, Inc.: Status of Limitations Under Section 10(b)*, 68 Nw. U. L. Rev. 162 (1973).

It is apparent from a reading of section 12 of the Illinois Securities Law (Ill. Rev. Stat. ch. 121 1/2, 137.12), for which section 13 supplies the three year limitation, that it closely parallels Rule 10b-5 and a study of the Illinois Securities Laws reveals a nearly identical aim. *Parrent*, *supra* at 127. Circuits which do not apply Blue Sky limitations either have higher standards for proof of scienter or dissimilar state securities statutes. Martin, *Statute of Limitations in 10b-5 Actions: Which State Statute is Applicable?*, 29 Bus. L. 443 (1974). Clearly, application of the Illinois Blue Sky limitations period

was foreshadowed, and in any event *Parrent* did not constitute an overruling of any clear past precedent of the Seventh Circuit.

Furthermore, following the rule in *Parrent* is not detrimental to the operation of Rule 10b-5 in this case inasmuch as the plaintiffs may and do call upon the mitigating doctrine of tolling. Equitable tolling is always available where fraud has concealed the wrong done. See part IV, *infra*. Since *Chevron* does not operate here, *Parrent's* three year limitations period applies retroactively.

IV

The defendants have challenged the plaintiffs' reliance on the theory of equitable tolling on two grounds: (1) that the tolling does not apply to claims based on negligence and (2) that the allegations of the complaints are insufficient to toll the limitations period.

A

Rodman & Renshaw, named a defendant along with six other brokerage houses in the original complaint of February 19, 1969, had employed Harris Nagorsky, one of the parties indicted in August 1967. During the period he was with Rodman, Nagorsky participated in the planning of the manipulation scheme, but he left in October 1965 before the scheme had run its course. Rodman contended that the limitations period ran from the time Nagorsky left its employ. This would mean that the original complaint was time barred by more than three months. The plaintiffs, however, claimed that the limitations period began to run in 1967. They argued that the period between 1965 and 1967 was tolled and that the statute of limitations did not begin to run until the alleged fraud was discovered when the New York indictment was returned.

Federal courts have long recognized the theory of equitable tolling in fraud actions. Clearly, it is available

to claimants in Rule 10b-5 actions. In *Parrent* the court said:

> We must read into the three year limitation applied in the Rule 10b-5 count the "equitable doctrine" that the statute does not begin to run until the fraud is discovered where a plaintiff injured by fraud "remains in ignorance of it without any fault or want of diligence or care on his part . . . ." 455 F.2d at 128.

In *Hochfelder* v. *Midwest Stock Exchange*, 503 F.2d 364, 375 (7th Cir. 1974), Chief Judge Swygert said:

> The equitable tolling doctrine provides that where a fraud which is the foundation of the suit has actively been concealed or is of such a nature as to conceal itself, the statute of limitations is tolled until the plaintiff has obtained knowledge of the fraud or in the exercise of due care should have obtained knowledge of the fraud. *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 396 (1945); *Morgan* v. *Koch*, 419 F.2d 993, 997 (7th Cir. 1969).

The federal tolling doctrine operates both against those who commit the alleged fraudulent acts and those who negligently facilitate fraud. The defendants have claimed that the tolling doctrine only operates against those who commit the fraud. They sought to find support in *Bryan* v. *United States*, 99 F.2d 549, 552 (10th Cir. 1938), *cert. denied*, 305 U.S. 661 (1939), and *Hayden* v. *Thompson*, 71 F.60 (8th Cir. 1895), both fraud actions. *Bryan* is no support because the fraud suit was dismissed upon the defense of sovereign immunity where the defendant employer was the United States Government. Application of the tolling doctrine to a negligent employer was not an issue. Neither does *Hayden* lend any support to the defendants' argument. In *Hayden*, the plaintiff, a customer, sued to recover fraudulently distributed dividends from a bank, its directors and shareholders. The court held that equitable tolling did not apply to one of

the bank's shareholders since neither a fraud nor a negligence claim had been alleged against him. The plaintiff's claims against the other shareholders and the directors were held to be timely on the theory of equitable tolling.

Equitable tolling embraces defendants such as Rodman & Renshaw who have facilitated by their negligence a Rule 10b-5 fraud. Chief Judge Swygert continued in *Hochfelder* v. *Midwest Stock Exchange, supra* at 375-76:

> If claims brought in the same posture as the instant action—asserting charges amounting to negligence but short of fraud—are to have any vitality, it cannot be contended that the tolling doctrine should not apply. Often the underlying fraud, carefully concealed in and of itself, would cloak the implementing actions of others. Accordingly, where the acts of a defendant facilitate the perpetration of a concealed fraud of another, the bar of the statute of limitations should not begin to run until a plaintiff obtains knowledge or through due diligence should have obtained knowledge of the underlying fraud.

This passage was cited approvingly in *Hochfelder* v. *Ernst & Ernst,* 503 F.2d 1100, 1119 (7th Cir. 1974), where equitable tolling was held to operate against the accounting firm of Ernst & Ernst for negligent facilitation and implementation of fraud although that firm was not chargeable with acts of fraud or fraudulent concealment.

Clearly, the action of Rodman & Renshaw fell within the ambit of equitable tolling. In their original claim for relief the plaintiffs alleged direct participation in the conspiracy to manipulate the price of Hercules stock as well as negligent facilitation. Even as equitable tolling works to prevent the defrauder from taking advantage of his wrongdoing, it also works to prevent the negligent person from taking advantage of his carelessness.

B

The plaintiffs' allegation of fraudulent concealment is sufficiently specific to support a request for equitable tolling. The defendants contended that the plaintiffs merely alleged their ignorance of the fraud. They claimed that the plaintiffs must allege their own diligence as well.

When pleading Rule 10b-5 fraud, plaintiffs must comply with Rule 9(b), Fed. R. Civ. P.[9] Once the underlying fraudulent practices are correctly pleaded, plaintiffs may then avail themselves of equitable tolling. The allegations of the pleadings here stated with particularity the circumstances of the conspiracy to defraud the purchasers of Hercules stock through market rigging. They were drawn primarily from the lengthy criminal indictment and were a detailed basis from which to claim fraudulent concealment. In paragraph 27 of the original complaint, the plaintiffs first alleged under the heading "Fraudulent Concealment" their own ignorance of the fraud until its discovery in 1967. They then stated:

> Plaintiffs and members of the class could not have discovered the combination, conspiracy, and other fraudulent acts at an earlier date by the exercise of due diligence since the combination, conspiracy, and fraudulent acts set forth herein had been fraudulently concealed by the defendants by various means and methods used to avoid the detection thereof.

In paragraph 25 of the first amended complaint they added:

> [T]he action is brought within one year after the discovery of the untrue statements and omissions of material facts alleged herein, and within one year

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[9] "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be pleaded with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

> after such discovery should have been made by the exercise of reasonable diligence . . . .

Furthermore, throughout the pleadings plaintiffs gave details of the active, continuous concealment of the fraud and have supported with discovery testimony their diligence.

Clearly the plaintiffs have alleged all the necessary elements of fraudulent concealment. In *Baker* v. *F&F Investment,* 420 F.2d 1191 (7th Cir. 1970), the court laid down the proper test:

> In order to obtain the shelter of the federal doctrine of fraudulent concealment, plaintiffs must be prepared to adduce sufficient evidence to warrant the conclusion that defendants concealed the basic facts disclosing the existence of a cause of action and that plaintiffs remained in ignorance of those facts through no fault of their own. 420 F.2d at 1199.

The plaintiffs have expressly alleged that they did not know of Rodman & Renshaw's involvement until the criminal indictment in *United States* v. *Projansky, supra,* was returned in August 1967. All of the plaintiffs deposed testified that they first learned of the rigging scheme either upon the publication given to the indictment or later from friends or their attorneys. The plaintiffs also alleged and deposed that the criminal conspirators concealed the fraud from them. There is ample discovery testimony showing that the conspirators gave the plaintiffs with whom they directly dealt misleading information, hiding from them at all times the true nature of their stock transactions. This testimony also stands uncontradicted. Finally by implication as well as expressly, the plaintiffs have alleged that their delayed discovery of the fraud was not their fault. A complaint when tested by summary procedures must be given the benefit of every possible implication. *United States* v. *Crown Zellerbach Corp.,* 141 F. Supp. 118 (N.D. Ill. 1956).

The discovery testimony of Robert Schaefer supported his claims. During the fall of 1965, he repeatedly telephoned Nagorsky and defendant Epstein and questioned them concerning the value and future of Hercules stock. The defendants have not put Schaefer's testimony into question.

Nor did the plaintiffs realize that Myers, Gorman and the Fogelsons might be participants in the manipulation scheme until 1972. These defendants were not indicted nor mentioned in the criminal indictment. In no way could the plaintiffs have known the part these defendants played until they had deposed the criminal defendants. Since discovery of the indicted conspirators was stayed until after their criminal trial, the plaintiffs were first able to take their testimony in the latter months of 1971. They did so promptly. By deposing Spero Furla, the plaintiffs learned of the meeting between five of the conspirators and Charles Myers, the president of Hercules-Galion, at the Hercules plant in the fall of 1965 after the market rigging plan had been put into operation. They also found that Myers was fully aware of the manipulation. By deposing Buddy Kozak, the plaintiffs learned of his activities while an employee of Link, Gorman & Peck and his relationship to its chief operating officer, Wilbur Gorman. By deposing Mark Rolland, they learned of David Fogelson's involvement.

In brief, the plaintiff's Rule 10b-5 claims against Rodman & Renshaw, Myers, Gorman, Dickholtz and the Fogelsons are timely.[10] The complaint as amended alleged with particularity the conspiracy to manipulate Hercules stock and stated all the necessary elements of defendants' fraudulent concealment. Equitable tolling must apply. The plaintiffs discovered the existence of

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[10] The record is not clear as to whether Dickholtz and the Fogelsons were parties to the original order of dismissal dated June 25, 1973, but the district court expressly included them in the "clarification" order of September 13, 1973.

the fraud in August 1967. The three year limitations period commenced running then for Rodman & Renshaw. One and one-half years later, in February 1969, the original complaint was filed naming Rodman & Renshaw among other brokerage houses. The plaintiffs discovered the roles which Myers, Gorman, Dickholtz and the Fogelsons played between November 1971 and March 1972. The limitations period then began running for these defendants. Less than a year later, in October 1972, the plaintiffs amended the complaint and added their names as parties-defendant.

The district court's orders granting judgment on the pleadings to defendant Rodman & Renshaw and summary judgment to defendants Myers, Gorman, Dickholtz and the Fogelsons are reversed. The district court will have jurisdiction over the pendent common law fraud claims. *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966).

C

Plaintiffs' action against the American Stock Exchange and its specialists is time barred. These defendants were first named in the amendment to the first amended complaint which was filed three and one-half years after the original complaint and more than five years after the criminal indictments. The plaintiffs contend that the AMEX and its specialists aided and abetted the manipulation scheme through lack of proper supervision.

The plaintiffs argued that they could only have discovered the AMEX's negligence after taking the following depositions from the brokerage houses:

(1) Deposition of Defendant Hertz-Warner & Co. per Irving Hertz 6/27/72 pp. 19 et seq; and Henry Warner 6/27/72 pp. 83 et seq.

(2) Deposition of Defendant Edward Wetzel 5/25/72, pp. 81 se seq. [sic.].

(3) Deposition of Defendant Reynolds & Co., per Anthony H. Englese 6/29/72 pp. 53 et seq.

(4) Deposition of Defendant Hornblower & Weeks, Hemphill, Noyes per William J. Lawlor, Jr. 8/1/72 pp. 59-61.

(5) Deposition of Defendant Link, Gorman & Peck per Wilbur A. Gorman 8/15/72 p. 21 and per June E. Carlson 7/6/72 pp. 69, 70. (Plaintiffs' Brief, p. 26.)

These depositions were taken after the criminal trial and after the plaintiffs had first deposed the criminal defendants. This discovery sequence, the plaintiffs believed, gave them a strategical advantage over the brokerage houses. Once the brokerage houses were deposed, the plaintiffs added the AMEX and its specialists to their list of defendants in October 1972.

The plaintiffs delayed discovery of the brokerage houses for too long. The criminal indictment stated that the criminal defendants were certified to trade securities on the AMEX, that they manipulated a stock registered with the AMEX, and that the manipulation took place on the floor of the Exchange itself. Also, the plaintiffs could have preliminarily deposed the brokerage houses on the behavior of the AMEX before the criminal trial. All of the depositions which the plaintiffs list above as essential to discovering the role which the AMEX and its specialists played during the stock rigging (except that of Wetzel) could have been taken before the criminal trial. The stay of discovery order was directed only to the indicted conspirators. Finally, gaining a strategical advantage is not a sufficient reason for delaying five years before naming these defendants. The sum of information the plaintiffs had concerning the AMEX before taking discovery of the brokerage houses was not increased by the 1971 and 1972 depositions. The three year limitations period had expired. The amendment to the first amended complaint came too late insofar as the AMEX and its specialists, John Rissetto, Al Vernieri, Edward Crooks and Frank Alter, were concerned.

The order of the district court granting summary judgment to the AMEX and its specialists must be affirmed.

V

The district court properly dismissed the plaintiffs' antitrust claims. At the start of this action the plaintiffs included a claim under section 1 of the Sherman Act, 15 U.S.C. § 1. Judge Decker dismissed it against the original brokerage house and criminal defendants. *Schaefer* v. *First National Bank of Lincolnwood,* 326 F. Supp. 1186 (N.D. Ill. 1970). Subsequently, on the basis of Judge Decker's opinion, Judge McMillen dismissed it against the non-criminal defendants.

The plaintiffs contended that the conspiracy to create and maintain an artificial trading price for Hercules stock on the AMEX was price fixing and a per se violation of the Sherman Act prohibition against conspiracies and combination to fix and maintain the price of goods in interstate commerce. The plaintiffs argued that the district court should not have dismissed the antitrust claims because the defendants' manipulatory practices fall within the literal language of the Sherman Act.

Securities exchanges do not enjoy a blanket exemption from the antitrust laws. In *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), the Supreme Court held that the antitrust laws do apply to exchanges and made such an assumption the starting point for any analysis of a conflict arising from their collision with the securities laws. The Court said at 357:

> The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and "[i]t is a cardinal principle of construction that repeals by implication are not favored." *United States* v. *Borden Co.,* 308 U.S. 188, 198; see *Georgia* v. *Pennsylvania R. Co.,* 324 U.S. 439, 456-457; *California* v. *Federal Power Comm'n,* 369 U.S. 482, 485. Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.

In fact, the antitrust laws are a necessary complement to the regulatory scheme of the securities acts. As the *Silver* Court said:

> Since the antitrust laws serve, among other things, to protect competitive freedom, i.e., the freedom of individual business units to compete unhindered by the group action of others, it follows that the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable. 373 U.S. at 359.

Although the *Silver* case was distinguished, its further operation was seriously questioned by the Supreme Court's opinion in *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973), holding that an antitrust action against a commodity exchange should be stayed to afford the Commodity Exchange Commission an opportunity to determine if the challenged conduct of the exchange was in compliance with the applicable statute and with exchange rules. *See also Chicago Mercantile Exchange* v. *Deaktor,* 414 U.S. 113 (1973).

Private parties may only bring antitrust claims against an exchange or its members when there is no other vehicle for review. In *Silver,* the Court allowed a private antitrust suit because the Securities and Exchange Commission was not granted any statutory means under the securities acts for reviewing a New York Stock Exchange order terminating direct wire telephone connections with non-members. The Court added in a footnote (358, n.12) that "[w]ere there Commission jurisdiction *and ensuing judicial review* for scrutiny of a particular exchange ruling . . . , a

different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity ...." (emphasis added).

The plaintiffs here have a forum for review unlike the plaintiffs in *Silver*. The plaintiffs have chosen to make claims both under section 10(b) and section 17 of the securities acts and under the antitrust laws.

By electing to make their claim for relief under the securities acts, the plaintiffs have rendered their antitrust claims superfluous. The sort of manipulation scheme underlying the plaintiffs' claim here was envisioned to be fully dealt with under the securities acts. 3 Loss, Securities Regulation 1529-70 (2d ed. 1961). The plaintiffs' Sherman and Clayton antitrust claims are dismissed for these reasons and for those appearing in Judge Decker's opinion, 326 F. Supp. 1186, 1190-92.

In summary, (1) we affirm the district court's dismissal of Count II (antitrust claims) as to all parties; (2) we affirm the district court's dismissal of Counts I (securities acts claims) and Count III (common law fraud claims) as to the American Stock Exchange, John Rissetto, Al Vernieri, Edward Crooks and Frank Alter; but we reverse the court's dismissal of Counts I and III as to all other defendants. The case is remanded for further proceedings consistent herewith.

Reversed in part; Affirmed in part; and Remanded.

FAIRCHILD, *Circuit Judge*, concurring. I agree in almost all respects with the opinion ably written for the court by Judge Sprecher. With respect to Part V (dismissal of the antitrust claims), the most persuasive argument seems to me to arise out of the contrast between the relevant language of the Securities Exchange Act and that of the antitrust laws. Although it is arguable whether or not, before the enactment of the Securities Exchange Act, the manipulation specifically described in §9(a)(2), 15 U.S.C.

§78i, fell within the far more general language of §1 of the Sherman Act, 15 U.S.C. §1, the later enactment not only specifically described the activity (expressly including acting "with one or more other persons," as well as "alone") and declared it unlawful, but in §28(a), 15 U.S.C. §78bb(a), very closely limited the recovery for violation, i.e., actual damages under the Securities Exchange Act, contrasted with treble damages under the antitrust laws, 15 U.S.C. §15. Under all the circumstances, it seems to me the more logical conclusion that the later enactment was either an implied amendment of the earlier, or was itself recognition by Congress that the activity described in §9(a)(2) of the Securities Exchange Act had not previously been prohibited by the antitrust laws.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1366

ROBERT AND SANDRA SCHAEFER, ET AL.,
Petitioners,

vs.

FIRST NATIONAL BANK OF LINCOLNWOOD, ET AL.,
Respondents.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COURT.

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ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COURT.

Respondent, Rodman & Renshaw, respectfully submits that the Petition for Writ of Certiorari filed by Robert and Sandra Schaefer, et al., is wholly without merit and prays that the Petition be denied.

QUESTION PRESENTED.

The question as presented by petitioners does not reflect the issues requiring favorable answers in order for petitioners to prevail.

Fairly put, the first question should be whether or not facts descriptive of a fraudulent manipulation of the price of shares of stock state a cause of action under Section 1 of the Sherman Act.

Only if this first question is answered affirmatively is the question posed by the case reached, i.e. whether or not conduct specifically actionable under the Securities Act is also actionable under the anti-trust laws.

STATEMENT OF THE CASE.

The Petition here seeks review of a decision of the trial court, dismissing, on motion, one count of a three count civil complaint, a dismissal which was affirmed by the Seventh Circuit Court of Appeals.

Petitioners' statement of the case, however, is not drawn from their pleading but appears to be an inaccurate review of the criminal case brought by the government, larded with matters that are not a part of this record.

What is reflected in this record is that Petitioners, in the first count of their complaint, sought recovery under every possibly applicable section of the Securities Act of 1933, the Securities and Exchange Act of 1934, and Rule 10(b)5 promulgated by the Securities and Exchange Commission for a fraudulent manipulation of the price of the stock of Hercules-Galion Products, Inc. (Hercules), a stock listed on the American Stock Exchange.

This manipulation as described in Count I, was accomplished by bribing representatives of the brokerage houses to induce customers to purchase Hercules, by purchases made by the conspirators themselves, and by timing of the purchases, all as stated in the pleading "creating actual and apparent trading in such security, and raising the price of such security, for the purpose of inducing the purchase of such security by others."

This same conduct was realleged and incorporated in Count II as a violation of Section 1 of the Sherman Act.

The statements as to the purpose of maintenance of the inflated price for merger purposes and the attempted merger (Petition pp. 6, 7) are not part of the pleading sought to be sustained and are not found in this record.

In the trial court, Judge Decker, whose opinion is included herein as Appendix A, found "there is no dispute that the market rigging scheme alleged in the complaint is completely encompassed within the proscriptions of Section 9 of the Act" (Appendix A, p. A3). (The reference is, in context, to Section 9 of the Securities Exchange Act of 1934.)

In the Court of Appeals, in the context of deciding whether the action could be maintained under Rule 10(b)5 *and* Section 9, Judge Sprecher stated that the conduct fell "squarely within section 9(a)2." (Petition, Appendix 13a.) Judge Fairchild, concurring, with reference to the antitrust count, declared the conduct as "the manipulation specifically described in § 9(a)(2)." (Petitioners' Appendix p. 28a.)

The Court of Appeals sustained Judge Decker for the reasons stated in his opinion and for the expressed reasons that petitioners had a full and complete remedy for a scheme "envisioned to be fully dealt with under the securities acts." (Petitioners' Appendix 28a.)

Judge Fairchild believed (Petitioners' Appendix p. 29a) that the later enactment, § 9(a)(2) of the 1934 Act, was an implied amendment of the Sherman Act *if* the conduct fell within the scope of the antitrust laws or a recognition that the activity had not previously been prohibited by the Sherman Act.

This Respondent has also filed a petition for certiorari seeking review of the Court of Appeals' holding, *inter alia*, that an action for which a specific remedy is granted under Section 9(a)(2) of the 1934 Act may also be implied and maintained under Section 10(b) of that Act, the Commission's Rule 10(b)5 promulgated pursuant to Section 10(b) and Section 17 of the 1933 Act. Respondent's petition was docketed May 29, 1975, as No. 74-1407.

REASONS FOR DENYING THE WRIT.

Legislative history and past precedent deny the claimed right of action under the Sherman Act for market manipulation. The issue sought to be imposed upon this Court by petitioners is stated as the "very narrow but important overlap" of anti-trust and securities acts remedies. (Petition, p. 9.)

As framed by the present case, the issue is so narrow that it has escaped the attention of anti-trust lawyers for the better part of a century and securities lawyers for some two score years. It is not difficult to discover the reasons for such oversight. Additional reasons, if necessary, abound in the petition itself.

I.

THE SECURITIES ACTS, AND SECTION 9(a)(2) OF THE SECURITIES EXCHANGE ACT OF 1934 IN PARTICULAR, WERE INTENDED TO AND DID FILL A REGULATORY VOID.

Petitioners' arguments do not attempt to explain the gap in antecedent authority supporting their theories since the passage of the Sherman Act and the Securities Acts. The obvious explanation for this gap is that a fraudulent price is not a fixed price as the latter term is thought of or used in anti-trust terminology. This obvious explanation is also the correct explanation as is demonstrable from the history of the Securities Acts and from the anti-trust background.

If investors injured in consequence of market manipulations already had a right of action under the Sherman Act, then Congress engaged in a useless act in passing § 9, and, indeed, § 17(a) and Rule 10b-5—if they also apply to market manipulation—since the remedy afforded by the Sherman Act is more liberal in its damage provisions and not subject to various limitations found in § 9 and the other two sections as well.

The fact of the matter is that the 1934 Act, and § 9 in particular, was passed because nobody, in or outside of Congress, believed that a person injured through market manipulation had any *federal* right of action on account of his injuries. Indeed, the explicit purpose of the 1934 Act was to fill a federal void and create a federal cause of action for market manipulation precisely because it was thought there was no existing federal civil remedy. To put the matter another way, it was believed that the only civil remedies then exisiting were under either the anti-fraud provisions of state Blue Sky laws or common law doctrines of fraud in the various states. No one in Congress thought it was engaging in a useless or superfluous act in passing § 9 by giving an alternative, but much weaker, remedy than already existed under the Sherman Act.

In Loss, Securities Regulations, Vol. 3 p. 1549 (2d Ed. 1961) it is stated:

> "The object of § 9(a)(2)—which the Commission has termed 'the very heart of the act'—is to outlaw not only pool operations but 'every other device used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage."

How could § 9(a)(2) possibly be the "heart" of the 1934 Act if all that it did was to give a more restricted single-damage remedy in addition to an existing treble damage remedy under the Sherman Act

Congress certainly thought it was passing § 9 in order to give a person injured by market manipulation *a federal statutory remedy that he did not then have*. This is made abundantly clear by the Committee reports and debates in Congress.

What finally became the Securities Exchange Act of 1934 was H. R. 9323. H. R. 1383 (73rd Cong., 2d Sess., 1934); The Home Report accompanying this bill, in referring to § 9, states:

> "To insure to the multitude of investors the maintenance of fair and honest markets, manipulative practices of all

kinds on national exchanges are banned * * *. *To make effective the prohibitions against manipulation civil redress is given to those able to prove actual damages from any of the prohibited practices.*" (Emphasis supplied.)

The Congressional Record is replete with statements by Congressmen stressing the necessity of passing § 9 in order to give injured investors a federal cause of action for injuries suffered in consequence of market manipulation. A few examples are given below.

At 78 Cong. Rec. 7717, Representative Ford from California said:

> "But if he [the investor] is sheared like a lamb through a rigged market, through manipulations resulting from wash sales and matched orders he has a legitimate cause for complaint, and it is his Government's business through its legislative and executive branches, to throw about this stock-purchasing and stock-selling business such safeguards as will make these trading devices, so long indulged in, *impossible in the future.*" (Emphasis supplied.)

At p. 7862, Representative Lea of California said:

> "This bill is severe in its denunciation and penalties for manipulative violations of the law. It not only prescribes criminal penalties for those who engage in these manipulative practices, but it also gives a civil suit in behalf of a man who is the victim of such practices. *It is going to be dangerous for a man to engage in window dressing fraudulent and deceptive methods for the purpose of defrauding investors.*" (Emphasis supplied.)

Representative Wolverton of New Jersey, at p. 7865, stated:

> *"The need for regulation of stock exchanges* and corporate securities having the benefit of the nationwide facilities afforded by such exchanges was revealed, if not already known by the recent investigation conducted by the Senate Committee on Banking and Currency. Manipulative price control methods were found to be practiced by corporate officers and others who utilized the stock exchange facilities to advance their nefarious and unconscionable schemes." (Emphasis supplied.)

The Representative, after referring to what eventually became § 9 (then § 8), said:

> "And, in addition to the declaration of criminal responsibility, there is also civil liability in favor of any person injured by any transaction. *If anyone should desire to observe a real genuine set of legislative teeth, he can do so by giving consideration to Section 8 of this Act.*" (Emphasis supplied.)

Petitioners' position is that Congress, in passing § 9, was not enacting legislative teeth on behalf of persons injured by market manipulation, but in fact was engaged in pulling teeth.

Again, Representative Mahoney of Connecticut said at p. 7869:

> "This bill is primarily *designed to prevent a manipulation of securities* * * *
>
> "Manipulative and misleading statements *to be hereafter forbidden by law* . . ." (Emphasis supplied.)

Representative Mapes of Michigan said at p. 7922:

> "The second main objective of the bill is to provide the owner in corporate securities traded in and upon our national stock exchanges and other investors, a fair and honest market place in which to buy and sell corporate securities * * *. It is to help them to maintain a fair and honest market price and open market, where the prices operated on the exchanges will represent as nearly as may be the value of the securities that are listed, uninfluenced by manipulative practices and evils which everyone condemns * * *"

The Senate version of the 1934 Securities Exchange Act was S. B. 3420. § 9 of the Senate version prohibited manipulation of security prices. Senator Fletcher, at p. 8163, in discussing this section, stated:

> *"We propose * * * to outlaw manipulation* and unfair practices and combinations by which to exploit the public and misrepresent values, such as pools, wash sales, fictitious transactions, and the like * * *" (Emphasis supplied.)

The Senator, after referring to the English decision of *Scott* v. *Brown*, 2 Q. B. 724 (1892), holding wash sales to be a fraud on the public, said at p. 8165:

> "The practice referred to appears to be unfair, unjust and really fraudulent, misleading the investing public. *We endeavor to stop it by this measure.*" (Emphasis supplied.)

Further examples might be multiplied. The ones given are sufficient to show that Congress, in passing § 9, felt it was outlawing a practice, *which federal law did not then outlaw* and was giving a civil remedy for market manipulation where none had existed previously. It bears repetition to say that, if market manipulation was in fact then actionable under the Sherman Act, § 9 (and § 17 of the 1933 Act and Rule 10b-5, to the extent they might apply to market manipulations) are completely useless pieces of law.

II.

MARKET MANIPULATION DOES NOT CONSTITUTE A RESTRAINT OF TRADE UNDER THE SHERMAN ACT.

If a fraudulent price is not a fixed price, no violation of the Sherman Act has been alleged and it is unnecessary to consider the problems of statutory construction or statutory accommodation which would then be presented.

It was settled law that manipulation of prices in the securities market constituted a fraud and not a restraint of trade at common law. *Barrett & Co.*, 9 S. E. C. 319; *Halsey, Stuart & Co., Inc.*, 30 S. E. C. 106, Meyer, *Law of Stock Brokers and Stock Exchanges* (1936 Supp.), pp. 84-86; Berle, *Stock Market Manipulation*, 38 Columbia Law Review 393; Berle, *Liability for Stock Market Manipulation*, 31 Columbia Law Review 264; *United States* v. *Brown*, 5 F. Supp. 81 (S. D. N. Y. 1933), *aff'd* 79 F. 2d 321 (2nd Cir. 1935); *Harper* v. *Crenshaw*, 82 F. 2d 845, *cert. den.* 298 U. S. 685 (1936). See, also, Annotation in 115 A. L. R. 271 entitled "Market Manipulation of Securities."

United States v. *Brown*, 5 F. Supp. 81 (S. D. N. Y. 1933), *aff'd* 79 F. 2d 321 (2nd Cir. 1935)[1], described why manipulation of the market was regarded as a species of common law fraud. There the court said at p. 85:

> "When an outsider, a member of the public, reads the price quotations of a stock listed on an exchange, he is justified in supposing that the quoted price is an appraisal of the value of that stock due to a series of actual sales between various persons dealing at arm's length in a free and open market on the exchange, and so represents a true chancering of the market value of that stock thereon under the process of attrition due to supply operating against demand. Cf. Northern American Telegraph Company v. Northern Pacific Railway Company (C. C. A.) 254 F. 417, 418.
>
> "If, however, the market for the stock listed on an exchange is a manipulated or controlled market, in which a group of insiders, in order to enable themselves profitably to dispose of their holdings, are artificially raising the quoted price of the stock on the only market to which any man who wishes to purchase that stock would inevitably resort, and an outsider buys in that market he obviously pays more—how much more perhaps cannot be estimated and, in any event, in a criminal case of this kind, is not material—than he would have paid in a free and open market, and hence is a victim of unfair dealing by the insiders. But he is entitled to a fair dealing and should get it. Wilson v. United States, 190 F. 427, 433, 434 (C. C. A. 2); Looker v. United States, 240 F. 932, 933-935 (C. C. A. 2)."

All of the foregoing properly demonstrates that the securities acts generally and § 9(a)(2) of the 1934 Act in particular, were enacted to prohibit that which was unregulated by any federal statute including the Sherman Act.

---

1. This case involved a fraudulent manipulation of a stock listed on the New York Stock Exchange and was brought under federal laws prohibiting the use of mails to defraud. Had the Sherman Act been thought to be applicable, it would have been unnecessary to proceed on the mail fraud charge.

III.

THE CLAIMED CONFLICTS ARE NONEXISTENT.

A.

This Court's Decisions.

Petitioners claim that the decision appealed from, "in distinguishing" the case of *United States* v. *Patten*, 226 U. S. 525 (1912), "misinterpreted, misconstrued and misapplied" that decision. The fact is that the case was not mentioned in the Court of Appeals' opinion.

There, the court considered the applicability of § 1 of the Sherman Act to an alleged criminal conspiracy to *corner* the market in cotton. A market corner, it was agreed (page 539), "consists * * * in acquiring control of all or the dominant portion of a commodity, with the purpose of artificially enhancing the price." One of the important features of a corner is to "purchase for future delivery" and "withhold from sale for a limited time." Despite the wealth of other detail, the amended complaint herein fails to describe the fraudulent transactions in a manner reaching this definition.[2]

It was against the contention that § 1 of the Sherman Act reached only agreements among competitors involved in interstate commerce to suppress competition among themselves that *Standard Oil* v. *United States*, 221 U. S. 1, 59 (1910) was quoted in *Patten*. The sum total of *Standard Oil* and of *Patten* as applicable here is that the anti-trust acts prohibit and punish

2. It is difficult to conceive a "corner" in the stock of a corporation. In the case of a commodity such as cotton, commercial necessities insure a continuing demand, enhancing price as a "corner" refuses to sell. A "corner" in corporate shares could be operative in the same manner only if, at the time, a "short" position obtained of meaningful magnitude. Apart from that situation, shares of stock of one corporation compete generally with innumerable other types of investment.

monopoly prices. *Standard Oil* made clear that the enchancement of prices due to monopoly was the evil at which the Sherman Act was directed. Speaking of the English decisions, Justice White (p. 57) noted "it came * * * to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices * * * came also in a generic sense to be spoken of * * * as being in restraint of trade."

The corner in the cotton market in *Patten* was designed to effect a monopoly price, not a fraudulent price. The agreement among those involved in the "corner" not to sell, enhanced prices in exactly the same way that a monopolist controlling a commodity with an assured demand, could. Nothing, it is repeated, in the amended complaint attributes to the alleged conspirators control of all or a dominant portion of the market for the stock of Hercules-Galion. Instead, the complaint charges simple roguery as the means of enhancing the price.

Petitioners also cite *Board of Trade of Chicago* v. *Olsen*, 262 U. S. 1 (1922) in support of their argument. It is submitted that, had the Sherman Act prohibited fraudulent manipulation of futures, there would have been no Grain Futures Act of 1922 and the case would not have been brought. Petitioners' further citation of *Cargill, Inc.* v. *Board of Trade*, 164 F. 2d 820 (7 Cir. 1947) is inapplicable to anything here involved.

In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 495 (1939) the Court, in an extended discussion of the types of acts which constitute restraints of trade in contemplation of the antitrust laws, pointed out that the term "restraint of trade" in the antitrust laws is to be given the meaning which the phrase had at common law. See, also, *Standard Oil* v. *United States*, 221 U. S. 1 (1910), *Schatte* v. *International Alliance*, 182 F. 2d 158, 159 (9th Cir. 1950); *U. S.* v. *Greater Kansas City Chapter, et al.*, 82 F. Supp. 147, 149 (W. D. Mo. 1949). In other words, "[The Sherman Act] does not purport to afford remedies for all torts committed by or against persons engaged in inter-

state commerce." *Hunt* v. *Crumboch,* 325 U. S. 821, 826 (1944). Since a conspiracy to manipulate the market had never been held a combination in restraint of trade, it cannot be deemed a conspiracy to restrain trade within the meaning of § 1 of the Sherman Act.

B.

The Alleged Circuit Court of Appeal Conflict.

The only case cited in support of the claim of conflict between circuits is *S. S. W., Inc.* v. *Transport Association of America,* 191 F. 2d 658 (D. C. Cir. 1951). Petitioners again claim the Court of Appeals here "misinterprets" the decision. The Court here did not mention, rely on, or interpret the case.

In any event, there is no conflict in the instant decision and the *S. S. W.* case. *S. S. W.* dealt with conduct subject to regulation by the Civil Aeronautics Act, 49 U. S. C. A. § 401 *et seq.,* which the Court stated (p. 662) "covers the dominant facts alleged in the present case as constituting a violation of the Anti-Trust Act." The Court emphasized that the Civil Aeronautics Act did *not* authorize an award of damages and noted in accordance with the Seventh Circuit here, "Where specific damage provisions are contained in regulatory statutes, it has been held that there may be no recovery of double damages under the Anti-Trust laws" (Page 663.)

Petitioners discern a resemblance between the cases because of the lack of specific damage provisions in Section 17 of the 1933 and Section 10(b) of the 1934 Act. Yet, petitioners assert that these same sections are "the primary bases for Count I here." (Petition p. 17.) It would appear that the governing consideration is whether *any* damage remedy is available and this is the view reflected in Judge Decker's opinion. (Appendix pp. 5-6.)

C.

Judge Decker's Decision.

Petitioners attack the trial court's decision as being in conflict with decisions in other circuits in its holding that punitive damages may not be recovered under common law counts for conduct covered by the Securities Act. In the context of this case, Judge Decker's opinion was eminently correct.

The Schaefers, the named petitioners here, had been paid approximately twice their out of pocket expenses by some defendants in return for an agreement not to execute any judgment obtained in the case against those making the payments. This deal was made without the knowledge of other defendants. When it became known, a motion to dismiss the Schaefers was made, based upon this payment. The motion was resisted on the ground, among others, that their asserted right to punitive damages under the common law count permitted their continued presence in the litigation.

Judge Decker's opinion dismissing the Schaefers, on these facts, was eminently correct.

CONCLUSION.

The Petition here reflects a simplistic view of matters with a long and intricate legal history. The determined sophistry with which petitioners' argument is advanced must yield to that history. Petitioners are not latter day discoverers of a treble damage bonanza, overlooked by others before them.

The Petition should be denied.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois
Eastern Division.

ROBERT SCHAEFER, ET AL.,
Plaintiffs,
vs.
THE FIRST NATIONAL BANK OF LINCOLNWOOD, ET AL.,
Defendants.
No. 69 C 364

MEMORANDUM OPINION.

This is an action brought by purchasers of the stock of Hercules Galion Products, Inc. to recover damages for defendants' alleged conspiracy to manipulate the market for such stock. The complaint to manipulate the market for such stock. The complaint names stockbrokerage firms, their employees, and certain other individuals and corporations, alleging a detailed scheme whereby defendants are said to have created an artificially active market for Hercules Galion stock in order to raise its price so that certain defendants could sell their holdings at a profit. The complaint, brought as a class action, contains counts based on the securities laws, the antitrust laws, and the doctrine of common law fraud.

A number of motions to dismiss have been filed. Those of general applicability will be considered first; then those relating to specific defendants or plaintiffs will be discussed.

Count 1—the Securities Acts.

Count 1 of the complaint states that defendants have violated sections 9, 10 and 15(c) of the Securities Exchange Act of 1934 and sections 12(2) and 17 of the Securities Act of 1933. Section 9 of the 1934 Act and section 12(2) of the 1933 Act have their own express limitations periods, while the other cited sections have none. Actions brought pursuant to section 9 must be commenced "within one year after discovery of the facts constituting the violation and within three years after such violation," (§ 9(e)). Actions pursuant to section 12(2) must be brought within one year after discovery of the untrue statement or omission, or after it should have been discovered, and within three years after the sale (§ 13 of the 1933 Act). The five year Illinois statute of limitations for fraud (83 Ill. Rev. Stat. § 16) applies, however, to actions brought under § 17 of the 1933 Act and § 10(b) of the 1934 Act. *Morgan* v. *Koch*, ... F. 2d ..... (7th Cir. 1969, No. 17447); *Northern Trust Company* v. *Essaness Theaters Corporation*, 103 F. Supp. 954 (N. D. Ill. 1952); *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783 (2d Cir. 1951).[1]

Many of the defendants in this cause were indicted for their alleged activity by a federal grand jury in New York in August, 1967. Because the complaint in this action was not filed until February, 1969, defendants contend that the action was commenced more than one year after discovery of the violation. They further argue that, since the alleged scheme falls within the prohibitions of § 9 and § 12(2), the other provisions of the Acts should not apply and therefore the one year time bar applicable to § 9 and § 12(2) requires dismissal of count 1.

1. Defendants argue that these and other cases applying state statutes of limitations are not well reasoned and should be disregarded in favor of application of one of the limitations provisions found in the Securities Acts. The doctrine of borrowing state limitations statutes is firmly entrenched in this and other Circuits, and for that reason is not open for consideration by this court. See 3 Loss, *Securities Regulation*, pp. 171 *et seq.*

Defendants' argument is logically persuasive. There is no dispute about their claim that the market rigging scheme alleged in the complaint is completely encompassed within the proscriptions of section 9 of the 1934 Act. To hold that the more expansive provisions of section 10(b) or section 17 apply, with their longer statutes of limitations, is to ignore the express limitations incorporated in the Act. And it assumes that the carefully inserted time limitation in section 9(e) was repealed, *sub silentio*, by passage of section 10(b) of the same Act, or was rendered meaningless *ab initio* by prior passage of the 1933 Act. Furthermore, it ignores the rationale of implied remedies under the Securities Acts enunciated in *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), where the Court made it clear that remedies were to be created "when necessary to make effective the congressional purpose." 377 U. S. at 433. When the congressional purpose has been congressionally implemented by statutory creation of remedies, as it was in §§ 9 and 12(2), the need for judicial implementation of its purpose is certainly diminished.

Despite these misgivings, however, I am constrained to hold that plaintiffs may maintain this action pursuant to section 10 (b), Rule 10b-5, and section 17. Such a holding is dictated by the decision of this Circuit's Court of Appeals in *Jordan Building Corporation* v. *Doyle, O'Connor & Co.*, 401 F. 2d 47 (7th Cir. 1968). The plaintiffs in that action sued brokerage houses, their employees, and the issuing corporation claiming that defendants fraudulently induced them to purchase certain debentures. The District Court dismissed count 1, which was premised on a violation of Rule 10b-5, because of its conclusion that the allegations of the complaint fell squarely within the prohibitions of § 12(2) of the 1933 Act. On appeal, the defendants also argued that § 15(c)(1) of the 1934 Act controlled and barred suit under Rule 10b-5. In its reversal, the Court of Appeals rejected these arguments, concluding that "the remedies supplied by and under these acts are cumulative and not mutually exclusive." 401 F. 2d at 51.

No meaningful distinction appears between the *Jordan* case and the instant action. The board and virtually unlimited role which the Court there assigned to Rule 10b-5 has equal applicability here. Accordingly, plaintiffs are not limited to the provisions of § 9 or § 12(2), but may also bring this action pursuant to § 17 of the 1933 Act and §§ 10 and 15(c) of the 1934 Act. The motions to dismiss count 1 in its entirety because of the short statutes of limitations applicable to §§ 9 and 12(2) must therefore be denied. See also *Klein* v. *Spear, Leeds, Kellogg, et al.* (S. D. N. Y. 1969), CCH, Fed. Sec. L. Reports, ¶ 92,454; *Osborne* v. *Mallory*, 86 F. Supp. 869 (S. D. N. Y. 1949); *Acker* v. *Schulte*, 74 F. Supp. 683 (S. D. N. Y. 1947).

Nor can this court conclude on the record before it that references to §§ 9 and 12(2) must be stricken from the complaint as barred by the short statutes of limitations. Defendants have filed extracts from the depositions of certain plaintiffs which indicate that they had knowledge of the criminal indictment soon after it was returned, and more than one year before the complaint was filed. These are, of course, not properly before the court on motions to dismiss. And plaintiffs should have a chance to rebut them by submitting evidentiary material. Defendants' motions to dismiss directed to this aspect of count 1 are therefore denied without prejudice to reassertion of the same issue by motion for summary judgment.

Count 2—The Sherman Act.

In count 2 of the complaint plaintiffs reallege most of the allegations of count 1 and claim that defendants have violated section 1 of the Sherman Act, 15 U. S. C. 1. No cases have been found which discuss the applicability of the anti-trust laws to securities market rigging schemes. For reasons to be stated, I have concluded that count 2 fails to state a cause of action.

As previously noted, section 9 of the 1934 Act expressly prohibits the type of stock market manipulation here alleged.

The Sherman Act's prohibition, on the other hand, is addressed more generally to contracts, combinations and conspiracies "in restraint of trade or commerce." As stated in *Montague* v. *Electronic Corporation of America*, 76 F. Supp. 933, 936 (S. D. N. Y. 1948), involving an apparent overlap of remedies under section 10(b) of the 1934 Act:

> "The settled rule of statutory construction is that, where there is a special statutory provision affording a remedy for particular specific cases and where there is also a general provision which is comprehensive enough to include what is embraced in the former, the special provision will prevail over the general provision, and the latter will be held to apply only to such cases as are not within the former. *United States* v. *Chase*, 135 U. S. 255, 260 . . .; *Ex Parte United States*, 226 U. S. 420, 424 . . .; *Kepner* v. *United States*, 195 U. S. 100, 125 . . .; *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208 . . ."

To the same effect, see *Jackson* v. *Cravens*, 238 F. 117 (5th Cir. 1916); *Jackson* v. *Chicago, R. I. & P. Ry. Co.*, 178 F. 432 (8th Cir. 1910); cf. *Labor Board* v. *Drivers Local Union*, 362 U. S. 274, 291-292 (1960).

The anti-trust laws have been held inapplicable in other contexts when a more specialized remedy was provided. For example, the Court in *Terminal Warehouse* v. *Penn R. Co.*, 297 U. S. 500 (1936), held that a shipper had no action for damages under the anti-trust laws against a competitor and the railroad which had granted preferences to the competitor, but was limited to relief provided by the Interstate Commerce Act. Similarly, the anti-trust laws were held to be unavailing to a steamship line which sued its competitors, alleging a conspiracy to restrain trade. The Court held that the Shipping Act of 1916 provided a remedy which superseded the anti-trust laws. *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932). Compare *S. S. W., Inc.* v. *Air Transport Ass'n of America*, 191 F. 2d 658, 663 (D. C. Cir. 1951), which succinctly summarized the law:

> "Where specific damage provisions are contained in regulatory statutes, it has been held that there may be no recovery of treble damages under the antitrust laws."

And see *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156 (1992).[2]

The authorities relied upon by plaintiffs do not weaken this long line of authority. In *United States* v. *Borden Co.*, 308 U. S. 188 (1939), a criminal case holding that the anti-trust laws were not impliedly repealed by the Agricultural Marketing Agreement Act, the latter Act did not provide a damage remedy for the kind of conduct covered by the Sherman Act. See the *1955 Report of the Attorney General's Commission to Study the Anti-trust Laws*, at 282. Similarly, in *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963), which held that the Bank Merger Act did not impliedly repeal the Clayton Act as it applied to bank mergers, the Court noted that the Bank Merger Act had no provision whatever for judicial proceedings and that the legislative history of that Act contained express statements to the effect that the applicability of the anti-trust laws was not affected. 374 U. S. at 351, 352.

Plaintiffs also point out that both the Securities Act of 1933[3] and the Securities Exchange Act of 1934[4] contain clauses pre-

2. Cases dealing with SEC or stock exchange rules or regulations allegedly violative of the anti-trust laws, see *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963); *Kaplan* v. *Lehman Brothers*, 371 F. 2d 409 (7th Cir. 1967); *Baum* v. *Investors Diversified Services, Inc.*, 286 F. Supp. 914 (N. D. Ill. 1968), *aff'd.* 409 F. 2d 872 (7th Cir. 1969), would only be relevant if plaintiffs based their claim for relief on the pegging of prices which was lawful under Commission regulations, which could occur under section 9(a)(6) of the 1934 Act. The language of the complaint indicates, however, that plaintiffs rely on section 9(a)(2), an unqualified prohibition, rather than on section 9(a)(6).

3. "Sec. 16. The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity."

4. "Section 28. (a) The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this title

serving "rights and remedies that may exist at law or in equity." They argue that remedies under the Sherman and Clayton Acts, which pre-date the Securities Acts, are therefore saved by these provisions.

There are two primary difficulties with plaintiffs' arguments. First, it assumes that a remedy for stock market manipulation at one time existed under section 1 of the Sherman Act. Yet there are no cases to support this contention. And it appears that, at common law, a market manipulation scheme such as is here alleged constituted fraud and not common law restraint of trade. *Barret & Co.*, 9 S. E. C. 319, 328 (1941); *Halsey, Stuart & Co., Inc.*, 30 S. E. C. 106 (1949); Berle, Stock Market Manipulation, 38 *Col. L. R.* 393 (1938). Because the interpretation of "restraint of trade" in the Sherman Act is to be given the meaning it had at common law, *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 498 (1940), the logical conclusion is that stock market manipulation schemes have never been within the coverage of the Sherman Act. And of course a non-existent remedy cannot be saved by the Securities Acts provisions cited above.

Moreover, as will be more fully discussed *infra*, the 1934 Act expressly limits recovery thereunder to actual damages, and the 1933 Act has been similarly construed. The language of the 1934 Act which limits damages is found immediately after the "saving clause" language,[5] indicating that only single damage remedies were to be preserved.[6] Thus, even if there once existed a Sherman Act cause of action for market manipulation, it was not saved by the later Securities Acts.

shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. . . ."

5. For the pertinent text, see note 4 supra.

6. See House Report 1383, accompanying H. R. 9323, 73rd Congress, Second Session, relating to what became section 28:

> "This subsection reserves rights and remedies existing outside of those provided in the Act, but limits the total amount recoverable to the amount of actual damages."

Finally, it is worth noting that a number of inconsistencies would result if plaintiffs were permitted to pursue both a Sherman Act and Securities Act cause of action. Beyond the differences in recoverable damages just referred to, there are significant differences in the governing statutes of limitation; compare section 13 of the 1933 Act and sections 9(e) and 18(c) of the 1934 Act with 15 U. S. C. 15b, and in the provisions for attorney's fees, compare section 9(e) of the 1934 Act with 15 U. S. C. § 15. These differences are substantial and would encourage investors to bring suit under the Sherman Act. Certainly Congress could not have intended that the damage restrictions contained in the carefully drawn prohibitions against market manipulation in the 1934 Act could be evaded and effectively nullified by the simple expedient of invoking the Sherman Act.

Count 3—Common Law Fraud.

Count 3 of the complaint incorporates the substantive allegations of count 1 but states that plaintiffs' right to recovery is based on common law fraud. Defendants' principal attack on this count is that, if counts 1 and 2 are dismissed, count 3 must also be dismissed since it contains no independent grounds of jurisdiction. Since this court has held, *supra*, that count 1 states a cause of action, defendants' contention is without merit. This court has pendent jurisdiction under the doctrine enunciated in *United Mine Workers* v. *Gibbs*, 383 U. S. 715, 725 (1966).

Certain defendants also claim that plaintiffs who have had no direct dealings with defendants will be unable to prove the elements of fraud necessary to permit recovery. The issues thus raised are factual, however, and cannot be resolved on the pleadings.

Motion to Dismiss Plaintiffs Robert and Sandra Schaefer.

The plaintiffs who initially filed this complaint are Robert and Sandra Schaefer. Since that time other named plaintiffs have been added by motion. Certain defendants have now moved to

dismiss the Schaefers from the complaint, claiming that they signed a covenant not to execute any judgment reached herein against certain defendants and that this instrument releases all defendants from liability to the Schaefers.

The Schaefers alleged in the complaint that they have suffered out of pocket losses of $4,572.99 in their dealings in Hercules Galion stock. The covenant not to execute, involving six defendants, states that the Schaefers have received $9,000 and that they therefore will not execute any judgment against these six parties. Although the covenant expressly states that no other defendants are thereby released, the law is clear that when the consideration for release from one defendant fully compensates the plaintiff for his alleged injury, all jointly liable defendants are also released. *Wagner* v. *C. & A. R. R. Co.*, 265 Ill. 245 (1914); *Husky Refining Co.* v. *Barnes*, 119 F. 2d 715 (5th Cir. 1941); *Rector* v. *Warner Bros. Pictures*, 102 F. Supp. 263 (S. D. Cal. 1952). The issue therefore becomes whether the $9,000 payment constituted full compensation to plaintiffs.

Under the Securities Acts, it is now authoritatively established that only actual, and not punitive, damages are recoverable. Section 28(a) of the 1934 Act so provides, see *Green* v. *Wolf Corporation*, 406 F. 2d 291 (2d Cir. 1968), *cert. den.* 395 U. S. 977, and the same limitation has been placed on the provisions of the 1933 Act by judicial interpretation. *Globus* v. *Law Research Services, Inc.*, 418 F. 2d 1276 (2d Cir. 1969); *Avern Trust* v. *Clarke*, 415 F. 2d 1238 (7th Cir. 1969). Moreover, "actual damages" under the Acts have been uniformly held to be limited to out of pocket losses, and do not include any speculative loss of profits. *Kohler* v. *Kohler Co.*, 208 F. Supp. 808, 825 (E. D. Wis. 1962), *aff'd.* 319 F. 2d 634 (7th Cir. 1963); *Estate Counseling Service, Inc.* v. *Merrill, Lynch, Pierce, Fenner & Smith*, 303 F. 2d 527, 533 (10th Cir. 1962); *Chaney* v. *Western States Title Insurance Company*, 292 F. Supp. 376 (D. Utah, 1968).

The Schaefers have received more than their out of pocket losses, measured by the difference between the allegedly inflated prices they paid for the securities in suit and the amount they received on their subsequent sale. Therefore, they have been fully compensated for damages sustained by the alleged violations of the Securities Acts, and count 1 must be dismissed as to them.

The Schaefers also seek punitive damages under the common law count. However, as previously noted, section 28(a) of the 1934 Act limits recovery to single damages. Although common law remedies are expressly preserved, the conclusion is unavoidable that common law damage rules permitting recovery in excess of actual damages have not been saved. Cf. *Meisel* v. *North Jersey Trust Company of Ridgewood, N. J.*, 216 F. Supp. 469 (S. D. N. Y. 1963). Because the 1933 and 1934 Acts are to be construed *in pari materia, Globus* v. *Law Research Service, Inc., supra,* at 1286, and cases cited therein, the result is that punitive damages may not be recovered under common law doctrines for conduct actionable under the Securities Acts counts. Therefore, having been fully compensated, the Schaefers must be dismissed from the complaint.

Motions to Dismiss Particular Defendants.

Defendant Peltz has alleged in his motion to dismiss that the complaint neither shows any causal connection between his actions and plaintiffs' injuries nor adequately charges that he was a participant in a conspiracy. But the complaint charges that Peltz, as a registered representative for Hertz, Warner & Co., agreed with the other defendants to artificially raise the price of the securities, received money from other defendants to induce their customers to buy Hercules Galion stock, and concealed these payments from buyers of this security. The complaint alleges an overall conspiracy and a number of overt acts —this is sufficient to withstand a motion to dismiss.

Peltz' causation argument amounts to a contention that no privity exists between himself and the plaintiffs. However, of the statutory provisions relied upon only § 12(2) expressly limits recovery to those in privity with the defendant. And the cases state that privity is not required for an action to be maintainable under Rule 10b-5. *Brennan* v. *Midwestern United Life Insurance Company,* 259 F. Supp. 673, 682-683 (N. D. Ind. 1966), and cases cited therein; *Geo. H. McFadden & Bro., Inc.* v. *Home-Stake Production Co.,* 295 F. Supp. 587 (N. D. Okla. 1968). Whether causation of these plaintiffs' injuries can be charged to Peltz, either alone or as part of a conspiracy, is a matter which must await trial for its resolution.

Defendants Morris and Eva Childs have also argued in support of their motion to dismiss that they are not sufficiently implicated by the charges made in the complaint. But they are charged with membership in the conspiracy, with transferring funds to other defendants to be used pursuant to an agreement to double the price of the stock, and with using funds borrowed from another defendant to purchase such securities. Whether the Childs were participants in the conspiracy, and whether these overt acts were innocent or culpable, are factual questions which cannot now be answered. The pleading as it stands, however, is sufficient to state a cause of action.

The First National Bank of Lincolnwood has moved to dismiss, contending that it cannot be held accountable for the criminal acts of its employees and directors. Along with the Bank, the chairman of its board of directors, two other directors and its president are also named as defendants. The Bank is named in the general conspiracy allegations of the complaint. Its officer and directors are charged with devising the scheme to inflate the price of Hercules Galion stock, and with taking various steps to implement it. The Bank is alleged to have loaned money to numerous principals in the conspiracy for the purpose of increasing the amount of trading in the securities.

Whether the Bank is chargeable as a principal participant in the conspiracy, whether it is liable on a theory of *respondeat superior* because of actual or apparent authority held by its employees and directors, or whether it will escape liability due to the nature of these individuals' alleged actions, are questions which involve the application of broad legal doctrines to the special facts of the case. See *Continental Baking Company* v. *United States*, 281 F. 2d 137, 149 (6th Cir. 1960); *Carroll* v. *First National Bank of Lincolnwood*, 413 F. 2d 353 (7th Cir. 1969); Fletcher, *Cyclopedia of the Law of Private Corporations* (1961), Vol. 10, p. 433; *Restatement of Agency Second*, § 219. The complaint on its face contains sufficient allegations to withstand the Bank's motion to dismiss.

Brokerage House Separate Defenses.

The court is grateful to the brokerage house defendants for presenting briefs, at its request, in support of their separate defenses. No motions are pending as to these issues. The court wishes only to point out that the questions of *respondeat superior* which are raised, and the questions relative to the extent of liability, if any, pursuant to the "controlling persons" provisions of the Securities Acts (section 15 of the 1933 Act and section 20(a) of the 1934 Act), are matters which must await further factual development for their resolution.

Conclusion.

For the reasons heretofore assigned, an order has been entered today dismissing count 2 in its entirety, dismissing plaintiffs Robert and Sandra Schaefer from the action, and denying all motions to dismiss in all other respects.

Enter:

BERNARD M. DECKER,
United States District Judge.

Dated: July 28, 1970.

Supreme Court, U. S.
FILED
MAY 30 1975
MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1366

ROBERT AND SANDRA SCHAEFER, ET AL.,
Petitioners,

vs.

FIRST NATIONAL BANK OF LINCOLNWOOD, ET AL.,
Respondents.

RESPONSIVE BRIEF OF RESPONDENTS THE AMERICAN STOCK EXCHANGE, INC., JOHN RISSETTO, AL VERNIERI, EDWARD CROOKS AND FRANK ALTER TO PETITION FOR A WRIT OF CERTIORARI.

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ARGUMENT.

I.

NO SPECIAL OR IMPORTANT REASONS FOR GRANTING THE WRIT ARE SET FORTH IN THE PETITION.

The Petition is plainly insubstantial. It fails to demonstrate that there are any "special or important" reasons for granting the Writ, within the meaning of Rule 19. Indeed, after carefully reading the Petition, respondents are not sure what it is about this case that petitioners consider important enough to justify seeking a Writ of Certiorari. Certainly, repeated state-

ments that antitrust enforcement is important given the "economic climate of our times" do not satisfy the requirements of Rule 19 (See Petition, pp. 4, 9).

The Petition makes vague allegations that the Seventh Circuit's decision is inconsistent with this Court's decision in *U. S.* v. *Patten*, 226 U. S 525 (1912), and "other circuit court decisions in the same general area of resolving limited jurisdiction of antitrust laws in certain areas that narrowly overlap with securities laws." (Petition, p. 12). These hints that the dismissal of the antitrust count was inconsistent with other decisions are neither true nor precise.

The Court of Appeals Opinion did not even mention the *Patten* case, though the Petition states that the Seventh Circuit "misinterpreted, misconstrued and misapplied" that decision (Petition, p. 10). Furthermore, *Patten* did not involve the manipulation of the price of stock. Rather, it involved the running of a corner on the price of cotton, a *commodity*, by competitors on the New York Cotton Exchange. The effect was to artificially raise the price of cotton, enable the conspirators to obtain control of available supply and "hamper users and consumers in satisfying their needs" 226 U. S. at 542. No such considerations are present here.

The Court of Appeals correctly held that the antitrust laws have been held applicable to other regulated industries only in situations where there was no alternative relief available to the aggrieved party (Petition, p. 27a). E.g. *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963): cf. *Ricci* v. *Chicago Mercantile Exchange* 409 U. S. 289 (1973). In such situations, implied repeal of the antitrust laws is severely proscribed, unless it is found that the challenged practice is necessary to the functioning of the regulatory statute which is asserted to pre-empt the antitrust laws.

Here, in contrast to such situations, a complete statutory scheme of relief under the Securities Act of 1933 and the

Securities Exchange Act of 1934, is specifically directed to the manipulation of stock prices, and was availed of by petitioners in Count I of their Complaint. Indeed, as to respondents Rodman and Renshaw, Myers, Gorman and Fogelson, the Court of Appeals reversed their dismissal under Count I, and remanded this case for trial as to those respondents on the alleged securities law violations (Petition, p. 24a).

In addition to the reasons stated in its Opinion, the Court of Appeals also adopted all of the reasons set forth in the District Court opinion for dismissing the antitrust count (Appendix, p. 28a; 326 F. Supp. 1186, 1190-92). The District Court Opinion reviewed the legislative history of the securities laws and concluded that they provided a complete remedy for manipulation of stock prices. Petitioners have not attempted to argue with the reasoning expressed therein.

II.

EVEN IF A REMEDY EXISTED UNDER THE ANTITRUST LAWS, OTHER GROUNDS ASSERTED TO THE COURT OF APPEALS BUT NOT RULED UPON BY IT, WOULD BAR AN ANTITRUST COMPLAINT AGAINST THE EXCHANGE AND SPECIALIST RESPONDENTS.

In addition, no purpose would be served by granting the Writ since two other independent grounds for barring an action against the Exchange and specialist respondents exist. These grounds were asserted in the Court of Appeals by the Exchange and the specialists in support of dismissing the antitrust count against them. The Court of Appeals did not find it necessary to reach either point in light of its holding that no remedy existed under the Sherman Act.

First, the antitrust count is barred as to the Exchange and the specialists by the four year statute of limitations contained in Section 4B of the Clayton Act. 15 U. S. C. § 15b. At the latest, the alleged conspiracy ended August 23, 1967 (Peti-

tion, p. 8a). The Amended Complaint naming the Exchange and specialists as additional defendants, was filed on October 18, 1972, over five years later (Petition, p. 9a). In light of the Court of Appeals holding that the statute of limitations was not tolled as to the Exchange and specialists (Petition, pp. 24a-26a), a finding not challenged by this Petition, the statute of limitations would bar the antitrust claims against the Exchange and specialists.

Second, even if a remedy existed under the antitrust laws, the allegations against the Exchange and specialists do not charge that they were part of the manipulation conspiracy, but only that they failed to prevent it. In essence, they are charged with violating the law by neglecting a duty to discover the conspiracy. Section 1 of the Sherman Act is not violated by inaction. A conspirator must actually have knowledge of the common plan, and commit some act in furtherance of it. As stated by the Seventh Circuit in *United States* v. *Standard Oil Company*, 316 F. 2d 884, 890 (7th Cir. 1963):

> "The substantive law of trade conspiracies requires some consciousness of commitment to a common scheme. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., et al., 346 U.S. 537, 540-541 74 S. Ct. 257, 98 L. Ed. 273. It has been stated there is no such thing as an 'unwitting conspirator.' United States v. National Malleable & Steel Castings Co., N. D. Ohio, 1957 C C H Trade Cases Par. 68890, at page 73601. Unless the individuals involved understood from something that was said or done that they were, in fact, committed to raise prices, there was no violation of the Sherman Act."

The mere allegation that the Exchange and specialists failed to properly supervise trading in Hercules-Galion stock does not meet the standards of knowledge and action required to state a cause of action for price fixing.

CONCLUSION.

For all of the foregoing reasons, respondents respectfully pray that the Petition for a Writ of Certiorari be denied.

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No. 74-1366

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT AND SANDRA SCHAEFER, ET AL., PETITIONERS

v.

FIRST NATIONAL BANK OF LINCOLNWOOD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States submits this Memorandum as *amicus curiae* in response to the Court's invitation of June 23, 1975.

STATEMENT

In August 1967, a federal grand jury charged several individuals with having manipulated the price of the stock of Hercules-Galion Products, Inc. ("Hercules") between 1965 and 1967, in violation of the federal securities laws, including Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a) ("Securities Act"), and Section 9(a)(2) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(a)(2) ("Exchange Act"), and in violation of the federal mail and wire

fraud statutes, 18 U.S.C. 1341 and 1343 (Pet. App. 6a–8a).[1]

Petitioners, individually and on behalf of a class of persons who had purchased Hercules stock between 1965 and 1967, instituted this civil action against the criminal defendants, certain brokerage firms at which various of the criminal defendants were employed, certain officers of Hercules, and the American Stock Exchange ("Amex") and certain of its specialists. The complaint alleged substantially the same events as were alleged in the indictment and charged the criminal defendants with violating Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); Sections 9(a)(2) and 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(a)(2) and 78j(b); and Section 1 of the Sherman Act, 15 U.S.C. 1; and with common law fraud (Pet. App. 7a–8a). The other defendants were charged with failure to take appropriate measures to prevent the manipulation.[2]

The district court dismissed petitioner's Sherman Act claim on the grounds that the antitrust remedy was superseded by the more specific remedies of the federal securities laws; that such manipulations con-

[1] Most of those indicted were convicted. See, *United States* v. *Projansky*, 465 F. 2d 123 (C.A. 2).

[2] The heart of the manipulation involved an alleged scheme by which the criminal defendants and others regularly purchased from each other large blocks of Hercules stock on the Amex at prearranged prices, creating public interest in the stock which enabled them to sell it at a profit. As a result of this activity, the price of the stock increased from $6 to more than $14 per share. The same conduct was alleged as the basis for all counts of the complaint.

stituted fraud rather than restraint of trade at common law and consequently were not covered by the antitrust laws; and that by enacting the Securities Exchange Act Congress had intended to limit recovery to actual damages rather than treble damages under the antitrust laws (Resp. App. A1–A12). Subsequently, the district court dismissed the claims against several of the defendants based upon the federal securities laws and common law fraud on the ground that those claims were barred by the three-year limitations period of the Illinois Securities Act. The district court reaffirmed the dismissal of the antitrust claims (Pet. App. 2a–5a).

The court of appeals affirmed the dismissal of the antitrust claims (Pet. App. 26a–28a), reasoning that "[p]rivate parties may only bring antitrust claims against an exchange or its members when there is no other vehicle for review," and that the plaintiffs had such a vehicle under the securities acts (Pet. App. 27a); and that the manipulation scheme underlying the plaintiffs' claim "was envisioned to be fully dealt with under the securities acts" (Pet. App. 28a). The court reversed the district court's dismissal of the federal securities law claims on the basis of the statute of limitations, holding that the limitation period had been tolled, with respect to certain of the defendants, until the fraud was discovered at the time the criminal indictment was returned (Pet. App. 15a–24a).[3] How-

[3] Rodman & Renshaw, a defendant securities broker-dealer, has petitioned this Court for a writ of certiorari to review this portion of the court of appeals' ruling. *Rodman & Renshaw* v.

ever, the court affirmed the dismissal of the Amex and its specialists, finding no tolling of the period (Pet. App. 24a–26a).

DISCUSSION

1. In holding that the existence of a damage remedy under the securities laws preempts private remedies under the antitrust laws, the court of appeals acted contrary to a long line of decisions by this Court which hold that repeal of the antitrust laws by implication is not appropriate in the absence of a "plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348, 350–351, and cases cited therein. Repeal of traditional antitrust remedies is implied only where "necessary to make [another regulatory scheme] work." *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357.

Repeal of private antitrust remedies is not necessary to effectuate the securities laws' prohibition of stock manipulation schemes. Here, unlike the situations in *Gordon* v. *New York Stock Exchange, Inc.,* No. 74–304, decided June 26, 1975, and *United States* v. *National Association of Securities Dealers, Inc.,* No. 73–1701, decided June 26, 1975, maintenance of the antitrust action would create no danger that participants in the securities industry might be subjected to inconsistent standards, since the conduct at issue was alleged to violate both the Sherman Act and the

Schaefer, No. 74–1407. A memorandum setting forth the views of the Securities and Exchange Commission on that case has been filed with the Court.

securities laws.[4] Indeed, in these circumstances the antitrust claim would supplement the enforcement of the securities laws.

There is no indication that, by creating a specific remedy for stock manipulations in Sections 9(a)(2) and 28(a) of the Securities and Exchange Act, Congress thereby intended to repeal private antitrust damage remedies that alternatively might be available to a party victimized by such a manipulation. This Court has repeatedly declined to construe special industry regulations that provide damage remedies as an implied repeal of the antitrust laws. See *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 218; *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Union No. 100,* No. 73–1256, decided June 2, 1975.

Nor, contrary to the court of appeals' ruling, does the limitation of recovery to actual damages under the securities laws indicate a congressional intent to preclude an alternative remedy, such as that available under the antitrust laws, that provides recovery in excess of actual damages. It is well established, for example, that where a claim under the securities laws is joined with a claim based upon common-law fraud or a state blue-sky law, the limitation upon recovery of damages under the federal securities laws does not preclude

[4] In *Gordon* and *National Association of Securities Dealers* this Court held that the antitrust laws were not applicable to practices which had either been approved by the Securities and Exchange Commission or were subject to the review of the Commission and had not been disapproved by that body.

punitive damages or attorneys fees under state law. See, *e.g., Flaks* v. *Koegel,* 504 F. 2d 702, 706–707 (C.A. 2); *Young* v. *Taylor,* 466 F. 2d 1329, 1337–1338 (C.A. 10); and *Coffee* v. *Permian Corp.,* 474 F. 2d 1040 (C.A. 5), certiorari denied, 412 U.S. 920. See III Loss, *Securities Regulation* 1624 (2d ed. 1961), VI Loss, *Securities Regulation* 3781–3783 (1969 Supp.).[5]

2. While we believe that the court of appeals' affirmance of the district court's dismissal of the antitrust count was erroneous as a matter of law, the case nevertheless involves a relatively unique situation that is not apt to recur with sufficient regularity to warrant review by this Court. In fact, neither we nor petitioners are aware of any prior cases in which manipulations involving securities, as distinguished from commodities, have been challenged as violative of both the antitrust and securities laws (Pet. 14). The decision therefore will have a negligible effect upon the efficacy of private treble-damage actions in supple-

[5] The court of appeals did not refer to the district court's dictum (Resp. App. A7) that, wholly apart from the interrelationship between the securities acts and the Sherman Act, stock market manipulations were not covered by the antitrust laws because they constituted fraud rather than restraint of trade at common law. This dictum is, we submit, incorrect. Under certain circumstances market manipulations may give rise to a cause of action under the Sherman Act. See *United States* v. *Patten*, 226 U.S. 525; *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113. Consequently, in view of the well-established principle that a complaint cannot be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle it to relief (*Conley* v. *Gibson*, 355 U.S. 41, 45–46), we believe the courts below erred in dismissing the antitrust count.

menting antitrust enforcement. Moreover, since the court of appeals' decision is restricted to the issue of overlapping private remedies, the decision would not significantly impede the government's antitrust enforcement efforts.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Defendants-Appellees.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

REPLY MEMORANDUM TO THE UNITED STATES AS AMICUS CURIAE

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REPLY MEMORANDUM TO THE UNITED STATES AS AMICUS CURIAE

MEMORANDUM IN RESPONSE TO AMICUS CURIAE MEMORANDUM OF THE UNITED STATES FILED PURSUANT TO ORDER OF THE SUPREME COURT

The plaintiffs-petitioners are gratified that the Solicitor General of the United States has agreed with our legal position with respect to application of the antitrust laws to stock market manipulation cases. However, we are totally dismayed that the Solicitor General has seen fit to recommend denial of Certiorari. Denial of Certiorari would, in our opinion, have serious deleterious results in view of the incorrect posture that would remain in this area of law if the decisions of the District Court and the Seventh Circuit Court of Appeals were permitted to stand.

The Solicitor General seriously misapprehends the number and quality of applications in this area of law. Reversal of the Seventh Circuit would not be expected to expand the number of cases involved in the courts, because each securities manipulation that constitutes an antitrust violation also constitutes a securities violation. It would merely add the appropriate rule of law and proper dimensions of damages to the existing manipulations cases. Moreover, the addition of the multiple damages threat could be reasonably foreseen to expedite the settlement of such cases and in amounts more nearly approaching the actual out of pocket damages of persons who can be expected to file claims. As has been experienced with the civil antitrust cases not dealing with securities, the settled cases still normally return substantially less than 100% of the claimants' dollar of actual damages.

It may be that a reduction of court time in the other securities cases can be accomplished due to the prospect of multiple damages in manipulation cases.

The assumption of the Solicitor General that the correct application of the law to this area would not have any significant effect on the private enforcement of the antitrust laws as a supplement to the governmental enforcement of the Statute is clearly erroneous. This misapprehension arises partly from the fact that the attempted application of antitrust treble statutory damages to securities manipulation cases is relatively novel. Indeed, we know of no other case where this issue has been raised as squarely as this case despite the conflicts indicated in the petition on neighboring areas. Another reason for the incorrectness of the assumption of the Solicitor General is the practice of the Justice Department and the SEC when manipulators are apprehended. In such an event, they are normally involved in more than one

manipulation. However, the government prosecution of the cases is normally limited to one of the several manipulations that the prosecutors may elect, either to ease their own case load or to save costs and avoid multiple prosecutions against the same individuals. Criminally, this would make some sense; civilly the victims of the unprosecuted manipulation may be left entirely out in the cold.

Manipulators in the instant case have testified during the course of depositions that they were involved in or knew of manipulation activity in several other stocks in the same time period and still other stocks at another earlier point in time. Moreover this information was furnished to the SEC and the Justice Department in connection with the cooperation in exchange for expectations of leniency. (See deposition of George Georges, third segment, of December 12, 1972, pp. 76-207 indicating additional manipulation activity in Alloys Unlimited, Mercury Chemical, Pentron, Ameco, Electronic Associates, Rolland Products.) Mr. Georges was not even named a criminal defendant, although he was one of the principal manipulators.

We do not seek to create new rights. We merely seek endorsement of the actual clear language of the Sherman Act. This may make little difference to the United States. The government may not care about the basis of their criminal prosecution for manipulation: securities violation, antitrust violation or both. Government civil remedies in stock manipulations are normally limited to injunctive relief. They are not effective civil enforcers. However, use of the antitrust provisions in private civil cases would permit much more effective private civil enforcement as an important adjunct of the statute.

CONCLUSION

For the reasons set forth herein and in our Petition for Certiorari, this Supreme Court should not turn its back on a clearly erroneous important legal position taken by the Seventh Circuit in an area of important public consideration. In addition to establishing the correct legal results, decisions by the Supreme Court correcting lower court's decisions could reasonably be anticipated to have a substantial deterrent effect on manipulators who otherwise would be more willing to take a chance on a traditionally light criminal sentence, if ever caught, and regurgitation of only a minor portion of the profits to be repaid at a very significantly later date, if at all. Reversal here would not only clarify an important area in our securities and antitrust laws, it would significantly serve to improve the image of justice and due process which our entire judicial system so badly needs.

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